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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX VOLUME I

Lester N. Turner
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Harbor Springs, MI
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Counsel for Petitioners

169pp

No 94-1109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER FILED

Apr 06 1995

IN RE: Leonard Green, Clerk

Richard L. Fishell and

Dorothy M. Fishell

Debtors

Richard L. Fishell and

Dorothy M. Fishell

Plaintiffs-Appellants

v

Robert Soltow and

Rosalee Soltow

Defendants-Appellees

John A. Porter, Trustee

BEFORE: ENGEL, KENNEDY and

SUHRHEINRICH, Circuit Judges

The court having received a petition for

rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____/s/_____
Leonard Green, Clerk pe

BEST AVAIL

No 94-1109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed

IN RE FISHELL

Feb 16 1995

Leonard Green, Clerk

Debtors

Richard L Fishell and

Dorothy M Fishell

Plaintiffs-Appellants

v

On Appeal from the United States District Court for the Western District of Michigan

Robert Soltow and

Rosalee Soltow

Defendants-Appellees

_____/

Not Recommended for Full Text Publication Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must

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be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: ENGEL, KENNEDY AND SUHRHEINRICH, Circuit Judges

PER CURIAM. Over objection of the debtors, the Bankruptcy Court approved a compromise that settled an adversary proceeding between debtors and their primary creditors, the Soltows. The debtors appealed to the District Court, arguing that the bankruptcy court abused its discretion in approving the compromise. The District Court first ruled that debtors lacked standing to appeal, but then proceeded to reach the merits of the appeal and affirmed the Bankruptcy Court, holding that the court had "apprised itself of the action's underlying facts and made an independent judgment as to whether the settlement was fair and equitable". (Dist.

Ct. Op. at 10). The Debtors now appeal to this court. We affirm.

I

This case traces its roots back to 1986, when Soltows loaned several hundred thousand dollars to the Fishells. The Fishells used the money to purchase a certain parcel of real estate and gave the Soltows a promissory note and mortgage on the property. In 1988, after Fishells defaulted on the loan, the Fishells and the Soltows entered into an amended agreement. As part of this agreement, the Fishells executed a new promissory note, which covered the original amount of the 1986 loan, as well as other interim, unsecured loans made by the Soltows to the Fishells. In return, the Soltows agreed not to start foreclosure proceedings and extended the time for repayment of the loan.

As part of the 1988 agreement, the Fishells also executed a warranty deed con-

veying the property to the Soltows. This deed was placed in escrow. According to the escrow agreement, if the Fishells defaulted again, the escrow agent was to release the deed to the Soltows, who would accept it as payment in full on the loan. If the Fishells did pay the loan in a timely manner, the escrow agent was to return the deed to them.

The Fishells did indeed default, and the escrow agent released the deed to the Soltows in March 1989. The Soltows then recorded the deed. In April 1989, however, the Fishells filed suit against the Soltows in Michigan state court, raising claims of fraud, usury, and equitable mortgage, and seeking to invalidate the warranty deed. In conjunction with the suit, the Fishells filed a notice of lis pendens. The Soltows responded to the suit and the filing of the notice by bringing a counterclaim for slander of title.

After the state suit had been pending for more than a year, the Fishells filed a Chapter 11 bankruptcy petition and removed the adversary proceeding to the Bankruptcy Court. After the bankruptcy proceeding had been pending for just over a year, the United States Trustee and several creditors moved to have the petition converted to a Chapter 7 proceeding. The Bankruptcy Court granted the motion, in part because it felt that it could no longer trust Mr Fishell to comply with the law. The court then appointed a trustee to oversee the estate.

After investigating the adversary proceeding between Fishells and Soltows, the trustee negotiated a settlement of that litigation. The terms of the compromise provided that both the Fishells and the Soltows would dismiss their claims against each other and that the court would cancel the notice of lis pendens. The settlement also required the Soltows to pay $2000

into the estate. In return, the Soltows would keep the property as satisfaction for the loan they made to Fishells. The trustee felt this was the most expedient and fair means of resolving the dispute and would enable him to satisfy the claims of the primary prepetition creditors, while still reserving sufficient funds in the estate to make substantial payments to the other creditors.

On June 12, 1992, the trustee filed a motion with the Bankruptcy Court asking it to approve the compromise. The Fishells objected to the compromise, but none of the creditors objected. On July 10, 1992, the Bankruptcy Court conducted a hearing on the trustee's motion and issued an opinion from the bench approving the settlement. The Fishells appealed the decision to the District Court, which concluded that the Fishells did not have standing to appeal and, even if they had standing, the

Bankruptcy Court had not abused its discretion in approving the settlement. The Fishells now appeal to this court.

II

A. Standing

Bankruptcy litigation, unlike other proceedings, has a special doctrine of appellate standing. Not all parties who are entitled to notice in the bankruptcy court are entitled to appeal the rulings of that court. In general, only parties to an adversary proceeding may appeal an order settling that litigation. Courts have, however, also created an exception allowing other 'aggrieved' parties to appeal. In Re El San Juan Hotel, 809 F 2d 151, 154 (1st Cir 1987). For purposes of the current appeal, the debtors are an aggrieved party only if they can show that a successful appeal would result in an estate whose assets exceeded its liabilities. Id. at 155 n 6.

In ruling on this issue, the District Court stated:

> The debtors contend that if the trustee had prevailed in the adversary proceeding and had successfully defended the counterclaim, the litigation would have created as estate with assets in excess of liabilities. The Debtors provide proof of the property's value and of Robert Soltow's claim. However, they provide no further information regarding the estate's other assets and liabilities, the cost of litigation, or other factors regarding the litigation's impact on the estate. The court finds that the debtors have not demonstrated that success in the adversary proceeding would have created an estate with assets in excess of liabilities. Accordingly, because the debtors have not shown that they are persons aggrieved by the bankruptcy court's order, the debtors lack standing to appeal.

(Dist Ct Op at 5).

The record filed with this court on appeal does not contain everything that was presented to the District Court. Based on information available to us, we are unable to say that the District Court erred in resolving the standing issue against the

Fishells. Even if that decision was erroneous, however, it is clear that the Fishells can not succeed on the merits of their appeal.

B. Approval of Compromise

The Federal Rules of Bankruptcy Procedure provide that

> [o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019. "The purpose of a compromise agreement is to allow the trustee and creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims...The law favors compromise and not litigation for its own sake,... and as long as the bankruptcy court has amply considered the various factors that determined the reasonableness of the compromise, the court's decision

must be affirmed." In Re A & C Properties, 784 F 2d 1377, 1380-81 (9th Cir)(citations omitted), cert denied, 479 US 854 (1986). We review a bankruptcy court's approval of a compromise under the abuse of discretion standard. Id. at 1380.

The Supreme Court has declared that

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v Anderson, 390 US 414, 424-25 (1968). "A bankruptcy judge need not hold a mini-trial or

write an extensive opinion every time he approves or disapproves a settlement. The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for that decision. The judge may make either written or oral findings; form is not important, so long as the findings show the reviewing court that the judge properly exercised his discretion." In Re American Corporation, 841 F 2d 159, 163 (7th Cir 1987).

When evaluating the fairness and equity of a proposed compromise, the court should consider:

> (a)The probability of success in the litigation;(b)the difficulties, if any, to be encountered in the manner of collection;(c)the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;(d)the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In Re A & C Properties, 784 F 2d at 1381 (quoting In Re Flight Transportaion Corp.

Securities Litigation, 730 F 2d 1128, 1135 (8th Cir 1984), cert denied, 469 US 1207 (1985)). Although it is preferable that these matters be addressed in the Bankruptcy Court's opinion, "[i]f, indeed, the record contains adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based." Id. at 437.

While the bankruptcy court's opinion is not quite as specific on some of these issues as we would like, the record before the court clearly supports the approval of the compromise. The Bankruptcy Court had before it the record developed in the state court proceeding, as well as the extensive record developed before the bankruptcy court itself. The Bankruptcy Court held several hearings and decided several

motions related to the instant proceeding. These included motions for summary judgment and a formal Rule 2004 examination of Richard Fishell. Accordingly, the Bankruptcy Court possessed a good deal of information and knowledge about the dispute between the Fishells and the Soltows and how that dispute affected the Fishells' other creditors.

An examination of the relevant factors supports the Bankruptcy Court's decision to approve the compromise. The first factor directs the court's attention to the merits of the adversary proceeding. In this case, there is not great merit to either Fishells' or Soltows'claims. The Fishells brought fraud, equitable mortgage and usury claims against the Soltows arising out of the 1988 amended agreement. The fraud and equitable mortgage claims were highly doubtful, especially in view of Mr Fishell's extensive experience in the real estate business.

That leaves only the usury claims, which, while containing merit, were not for substantial sums of money, probably not what it would cost to litigate those claims. The Soltows' slander of title claim is likewise not very strong, although it might contain sufficient merit to make it costly to litigate. See e.g. Patten Corp. v Canadian Lakes Dev. Corp., 788 F Supp 975 (WD Mich 1991); Kauffman v Shifman, 426 NW 2d 819 (Mich Ct App 1988); Sullivan v Thomas Organization, 276 NW 2d 522 (Mich Ct App 1979). Thus, contrary to Fishells' assertions, the positions of both parties lacked substantial merit, and the estate did not have a strong likelihood of winning much money.

The fact-intensive nature of the dispute also means that any litigation would be time consuming and expensive. Even if the Fishells were completely victorious and succeeded in revoking the deed, the estate would still owe the Soltows more than half

a million dollars. The Soltows had taken the deed in lieu of foreclosing on the land. Should the deed be invalidated, the Soltows would still have the equivalent of a mortgage securing their loans to the Fishells. In addition, the Bankruptcy Court explicitly found, the Fishells had established a pattern of delaying legal proceedings, which would only add to the estate's expenses. The settlement allowed the Soltows to keep the deed, required them to pay $2000 to the estate, and left sufficient money in the estate to make substantial payments to the Fishells other creditors. These factors support the conclusion that the compromise was the most efficient and economical way of resolving the suit between the Fishells and the Soltows.

The Fishells' primary argument on appeal is that the Bankruptcy Court did not conduct an evidentiary hearing and did not explicitly inquire into many of the factual

issues underlying the adversary proceeding. The court, however, is not requied to go into the detail urged by the Fishells. The result of any such requirement would be virtually indistinguishable from a trial, which is the very thing the compromise was designed to avoid. The record before the Bankruptcy Court was sufficient to conclude that those factual matters would be time consuming to resolve and that, regardless of the resolution, the litigation expenses would drain more from the estate than was likely to be recovered. Accordingly, the Bankruptcy Court did not abuse its discretion in approving the compromise, and the District Court was correct to affirm that approval.

III

For the foregoing reasons, we AFFIRM the judgment of the District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Bankruptcy Court
File No NG 90-85144

Adv Pro No 91-8015

---/

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Plaintiff/Appellants

File No 1:92-CV-845

Hon Benjamin F. Gibson

v.

ROBERT SOLTOW and
ROSALEE SOLTOW

Defendants/Appellees

ORDER

---/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 7th day of December 1993.

PRESENT: HON BENJAMIN F. GIBSON,
U. S. DISTRICT JUDGE

In accordance withthe Opinion dated

December 7, 1993, IT IS HEREBY ORDERED that the United States Bankruptcy Court's July 14, 1992, Order Granting Trustee's Motion to Approve Settlement is AFFIRMED.

IT IS FURTHER ORDERED that the following orders of the United States Bankruptcy Court, entered in pursuance of the July 14, 1992 Order Granting Trustee's Motion to Approve Settlement, are AFFIRMED: Stipulation and Order of Dismissal of Counter-Claim entered July 17, 1992; and Stipulation and Order of Dismissal and Cancellation of Lis Pendens entered July 20, 1992.

IT IS FURTHER ORDERED that the debtors' appeal (filed on September 3, 1992) is DISMISSED.

IT IS SO ORDERED

/s/
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Bankruptcy Court
File No NG 90-85144
Adv Pro No 91-8015

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Plaintiff/Appellants

v.

ROBERT SOLTOW and
ROSALEE SOLTOW

Defendants/Appellees

File No 1:92-CV-845

Hon Benjamin F. Gibson

OPINION

This case involves an appeal from an order of the United States Bankruptcy Court for the Western District of Michigan approving a settlement of an adversary proceeding in appellants' Chapter

7 case. At issue is whether the bankruptcy court abused its discretion in approving the settlement. For the reasons stated below, the bankruptcy court's decision is affirmed.

I

In July 1986, Debtors Richard L. Fishell and Dorothy M. Fishell ("the debtors") and Robert Soltow entered into a promissory note and a mortgage. Soltow loaned the debtors $350,000.00 at 15% interest per year, with semi-annual payments due beginning January 7, 1987, and the principal and all accrued interest due on July 7, 1989. The obligation was secured by a mortgage on a parcel of real property in Oneida Township, Eaton County, Michigan ("the property").

The debtors did not pay any amounts to Soltow under the promissory note. In early 1988, Soltow notified

the debtors that the loan was in default and that he would commence foreclosure proceedings if they did not fully repay the loan. In resolution, on August 25, 1988, the debtors and Soltow entered into an amended promissory note, a mortgage modification agreement, and an escrow holding agreement. The amended promissory note had a principal sum of $610,446.14 and included additional monies Soltow had loaned to the debtors. Accordingly, the amended mortgage secured indebtedness of $610,446.14.

Under the amended promissory note, the debtors had until February 15, 1989, to make full payment. The escrow holding agreement provided that Soltow would place a mortgage discharge in escrow and that the debtors would place an executed warranty deed in escrow. If the debtors did not pay the indebtedness by February 15, 1989, the escrow agent was required

to release the two documents to Soltow. Soltow would be entitled to destroy the mortgage discharge and record the warranty deed. Conversely, if by February 15, 1989, the debtors paid the full amount owed, the escrow agent was required to release the documents to them. The debtors then would be entitled to destroy the warranty deed and record the mortgage discharge.

The debtors did not make any payments to Soltow. Therefore, pursuant to the escrow holding agreement, the escrow agent delivered the warranty deed and mortgage discharge to Soltow. On March 16, 1989, Soltow recorded the warranty deed in the Eaton County Register of Deeds.

In response, the debtors filed this action against Robert Soltow and Rosalee Soltow in the Circuit Court for the County of Eaton, Michigan. The debtors

sought to cancel the warranty deed. The debtors alleged fraud, misrepresentation, lack of consideration, that the deed was in reality a mortgage, and that the interest on the loans was usurious. The debtors further filed a notice of lis pendens with respect to the property. The Soltows filed a counterclaim, alleging that the lis pendens had slandered title to the property.

On November 16, 1990, the debtors filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. Thereafter, the debtors removed this action to the bankruptcy court. On January 13, 1992, following a hearing on motions filed by the United States Trustee and Robert Soltow 1, the bankruptcy court entered an order converting the debtors' case from a Chapter 11 proceeding to a Chapter 7 liqui-

1. Creditor Patricia Andre filed a brief in support of the trustee's and Robert Soltow's motions.

dation. The debtors appealed and this Court affirmed the bankruptcy court's decision.

The Chapter 7 Trustee hired an attorney to investigate and evaluate the parties' claims in this action. After analysing the claims and after conducting a hearing of debtor Richard Fishell pursuant to Federal Rule of Bankruptcy Procedure 2004, the Trustee filed a motion to approve settlement pursuant to Federal Rule of Bankruptcy Procedure 9019. The debtors presented the only opposition to the proposed settlement. After a hearing on July 10, 1992, the bankruptcy court approved the settlement. The bankruptcy court denied the debtors' amended motion for rehearing and/or reconsideration. This appeal followed.

II

Appellees argue that the debtors

lack standing to appeal the bankruptcy court's order approving the settlement. In In Re Revco DS, Inc., 898 F 2d 498, 499 (6th Cir 1990), the sixth circuit held that in bankruptcy, appellate standing is limited to "persons aggrieved" by the bankruptcy court's actions.2 "Persons aggrieved" are "persons with a financial stake in the bankruptcy court's order." Id. (citations omitted).

The general rule is that the debtor is not a person aggrieved. In Re MCI, Inc. 151 BR 103, 106 (ED Mich 1992). However,

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2. The Sixth Circuit further held that the "pecuniary interest" test is not the only test for appellate standing. In addition, "[t]he Supreme Court has held that a public interest may also give a sufficient stake in the outcome of a bankruptcy case to confer appellate standing." In Re Revco DS Inc., 898 F 2d at 499 (citations omitted). However, the debtors do not contend that they have appellate standing based upon the "public interest" test.

under the following two situations a debtor has standing to appeal a bankruptcy court's order:

> (1)[I]f a successful appeal by the debtor would create an estate that has assets in excess of liabiliities; or (2) an appeal taken from orders that affect the terms, conditions and extent of a debtor's discharge.

Id. (citations omitted).

The debtors contend that if the trustee had prevailed in the adversary proceeding and had successfully defended the counterclaim, the litigation would have created an estate with assets in excess of liabilities. The debtors provide proof of the property's value and of Robert Soltow's claim. However, the provide no further information regarding the estate's other assets and liabilities, the costs of litigation, or other factors regarding the litigation's impact on the estate. The Court finds that the debtors have not demonstrated that success in the adversary

proceeding would have created an estate with assets in excess of liabilities. Accordingly, because the debtors have not shown that they are persons aggrieved by the bankruptcy court's order, the debtors lack appellate standing.

III

Even if the debtors were persons aggrieved by the bankruptcy court's order, this court finds that the bankruptcy court did not abuse its discretion in approving the settlement. Federal Rule of Bankruptcy Procedure 9019(a) provides:

> On motion by the trustee and after a hearing on notice to creditors, the United States Trustee, the debtor and indenture trustees as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

Thus, the bankruptcy court must review all settlements to determine whether they are fair and equitable:

In bankruptcy proceedings, as dis-

> tinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable. Protective Committee for Independent Stockholders of TMT Trailer Ferry v Anderson, 390 US 414, 424, 88 S Ct 1157, 1163, 20 L Ed 2d 1 (1968); In Re A & C Properties, 784 F 2d 1377, 1381 (9th Cir) cert denied 479 US 854, 107 S Ct 189, 93 L Ed 2d 122 (1986). In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. In Re American Reserve Corp. 841 F 2d 159, 162-63 (7th Cir 1987). The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is "reasonable". Id. at 162.

Reynolds v Commissioner, 861 F 2d 469, 473 (6th Cir 1988); see also Bauer v Commerce Union Bank, 859 F 2d 438, 441 (6th Cir 1988) cert denied 489 US 1079 (1989).

This court reviews the bankruptcy court's decision to approve the settlement for an abuse of discretion. In Re A & C Properties, 784 F 2d at 1380; In Re American Reserve Corp., 841 F 2d at 162. As the moving party,

the trustee bears the burden of persuading the bankruptcy court that the settlement is fair and equitable and that the court should approve the settlement. In Re A & C Properties, 784 F 2d at 1381. In analyzing a settlement, "the court is obligated to weigh all conflicting interests in deciding whether the compromise is "fair and equitable", considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors." Bauer, 859 F 2d at 441 (citing In Re American Reserve Corp., 841 F 2d at 161). When examining a proposed settlement, "[t]he bankruptcy judge may give weight to the opinions of the trustee, the parties, and their attorneys." In Re A & C Properties, 784 F 2d at 1384 (citation omitted).

In essence, the bankruptcy court must make an independent judgment that a proposed settlement is fair and equitable:

> As we have recognized in other contexts the abuse of discretion standard recognizes that because of the bankruptcy judge's unique position, second-guessing by appellate courts will do little to improve upon bankruptcy judge's decisions.
> ...
> In exercising his discretion, the bankruptcy judge must also give the reviewing court "some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval...unsupported by evaluation of the facts or analysis of the law". TMT Trailer Ferry, 390 US at 434, 88 S Ct at 1168. In other words, the bankruptcy judge must make findings and explain his reasoning sufficiently to show that he examined the proper factors and made an informed and independent judgment.

In Re American Reserve Corp., 841 F 2d at 162 (citations omitted). However, the bankruptcy court is not required to hold a mini-trial or write an extensive opinion:

> The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision. The judge may make either written or oral findings; form is not important, so long as the findings show the reviewing court that the judge

properly exercised his discretion. In Re American Reserve Corp., 841 F 2d at 163. Therefore, "as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed. In Re A & C Properties, 784 F 2d at 1381 (citation omitted).

At the July 10, 1992, hearing on the trustee's motion to approve settlement, the trustee's attorney and the Soltows' counsel presented arguments in favor of the settlement. No creditor opposed the proposed settlement. The debtors made the only objections to the motion. The debtors did not introduce evidence or testimony in opposition to the settlement.

The bankruptcy court stated that it had read all briefs that were timely filed. The bankruptcy court further specifically stated that the court had read the debtors' brief in opposition to the settlement.

During the debtors' presentation at the hearing, the debtors filed an additional brief with the court. The debtors' attorney acknowledged that the court would not have time to read the brief during the hearing and he stated that therefore he had argued the brief's contents. Additionally, the release and settlement agreement attached to the trustee's motion to approve settlement contained a summary of underlying facts and procedural history along with the factors upon which the settlement was based.

After hearing arguments by attorneys for the trustee, the Soltows, and the debtors, the bankruptcy court reviewed the underlying facts of the action and its procedural history. The court found that the adversary proceeding had a long history of delays and that if the action were not settled, more delays would follow. The bankruptcy court further found

that the debtors had repeatedly delayed the action and stated that in the court's opinion the debtors did not want the action to come to trial.

The bankruptcy court next commented upon the merits of the claim and stated that the debtors may have had a claim for usurious interest. The bankruptcy court was familiar with the parties' legal theories. At the July 10, 1992, hearing, the debtors' attorney acknowledged that the court had held numerous hearings in this action, including a hearing on the Soltows' and the debtors' motions for summary judgment. The debtors' attorney further stated that both parties had filed "substantial" motions for summary judgment. This Court notes that the parties had extensively briefed the motions and their respective opposition. The court finds that the bankruptcy court's comments during the July 10, 1992 hearing demonstrated

that it was well versed in the law underlying the adversary proceeding.

The bankruptcy court further noted that no creditor had objected to the proposed settlement. The court noted that the debtors had presented the only objection. The bankruptcy court stated that in the court's opinion the debtors wanted to create further expense, which the trustee was trying to avoid. The bankruptcy court stated that, generally, courts encourage settlements and that parties usually are better able that the court to settle actions on a reasonable basis. Based upon its findings and analysis, the bankruptcy court approved the proposed settlement.3

---

3. Further, at the August 21, 1992, hearing regarding the debtors' motion for rehearing of the order approving settlement, the bankruptcy judge again discussed the underlying facts and procedural history. The bankruptcy judge again stated that the debtors had repeatedly delayed the action. The bankruptcy court noted that the debtors

IV

Based upon review of the record in this action, the Court finds that the bankruptcy court fulfilled its affirmative obligation to apprise itself of the action's underlying facts and to make an independent judgment as to whether the proposed settlement was fair and equitable. The Court further finds that bankruptcy court's opinion demonstrates that the court amply considered the various factors that determined the reasonableness of the proposed settlement. Therefore, the bankruptcy court did not abuse its discretion in approving the settlement. Accordingly,

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3.(cont.)
presented the only opposition to the settlement and that no basis existed for their objections. The bankruptcy court concluded that "the Court felt ... that the settlement was reasonable and the court approved of the settlement." Accordingly, the bankruptcy court denied the debtors' motion for rehearing.

the bankruptcy court's July 14, 1992, Order Granting Trustee's Motion to Approve Settlement is affirmed.

__/s/_____
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: December 7, 1993

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Chapter 7
Hon David E. Nims Jr
Case No NG90-85144

ORDER DENYING MOTION FOR RECONSIDERATION AND AWARDING SANCTIONS

At a session of said Court held in the U.S. Bankruptcy Court, Western District of Michigan, this 25th day of August 1992.

PRESENT: HON DAVID E. NIMS, JR.
U.S. Bankruptcy Judge

The Debtors' Amended Motion for Rehearing and/or Reconsideration of an Order approving the settlement of a certain adversary proceeding between the debtors, as plaintiffs, and Robert and Rosalee Soltow, as defendants (Adversary Proceeding No: 91-8015), having come before the court, the court having heard argument of counsel and finding

that there is no basis for the Debtors' Motion and that the imposition of sanctions under Federal Rule of Bankruptcy Procedure 9011(a) is warranted, the court being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Debtors' Amended Motion for Rehearing and/or Reconsideration of Order Approving Settlement be and hereby is denied.

IT IS FURTHER ORDERED that Roger L. Fishell, the attorney signing the motion, shall pay to Robert Soltow and Rosalee Soltow, through their counsel, Mark A. Bush, the sum of one thousand and 00/100 ($1,000.00) dollars and shall pay the Chapter 7 Trustee, John A. Porter, the sum of five hundred and 00/100 ($500.00) dollars as sanctions for violating Federal Rule of Bankruptcy Procedure 9011.

IT IS FURTHER ORDERED that a copy of

this order be served by ordinary first-class mail upon the following interested parties: Richard L. and Dorothy M. Fishell, 13625 Tallman Road, Eagle, MI 48220; Roger L. Fishell, Esq., 1900 Main Street, Suite 214, Sarasota, FL 34236; Robert and Rosalee Soltow, 13665 Tallman Road, Eagle, MI 48822; Mark A. Bush, Esq., Fraser, Trebilcock, Davis & Foster, 1000 Michigan National Tower, Lansing, MI 48933; John A. Porter, Esq., 622 Commerce Building, Grand Rapids, MI 49503; Harold E. Nelson, Esq., Clary, Nantz, Wood, Hoffius, Rankin & Cooper, 500 Calder Plaza Building, 250 Monroe Avenue, N.W., Grand Rapids, MI 49503; and U. S. Trustee, 190 Monroe Avenue, N. W., Suite 200, Grand Rapids, MI 49503.

__/s/_____
Hon David E. Nims Jr.
U. S. Bankruptcy Judge

Return service copies to:
Harold E. Nelson, Esq.
500 Calder Plaza Building
250 Monroe Avenue, NW
Grand Rapids, MI 49503

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In re

RICHARD & DOROTHY FISHELL
Debtors Case No NG90-85144

RICHARD & DOROTHY FISHELL
Plaintiffs

v Adv Pro No 91-8015

ROBERT & ROSALIE SOLTOW

Defendants

APPEARANCES:
ROGER L. FISHELL, ESQ.
1900 Main St #214
Sarasota, FL 34236
On behalf of the Debtors

MARK A. BUSH, ESQ.
1000 Michigan National Tower
Lansing, MI 48933
On behlf of the Soltows

HAROLD E. NELSON, ESQ.
500 Calder Plaza
Grand Rapids, MI 49503
On behalf of the Trustee

TRANSCRIPT

This is a transcript of the hearing on the Motion for Rehearing held on Friday,

August 21, 1992, at Grand Rapids, Michigan before the HONORABLE DAVID E. NIMS, JR., U.S. Bankruptcy Judge. (p2)

The Clerk: Richard and Dorothy Fishell.

The Court: This case is before the court for a hearing on the motion for rehearing of an order approving a settlement. Record may indicate the appearance of Mr Roger L Fishell, Attorney for the Debtors. Are there any other appearances?

Mr Bush: Yes, your Honor. Mark Bush on behalf of Mr and Mrs Soltow.

The Court: Any--

Mr Nelson: Your Honor, Harold Nelson representing the Chapter 7 Trustee, John Porter, and the record should reflect that Mr Porter is also in the courtroom.

The Court: All right. Any other appearances? Apparently not.

Mr Fishell you may proceed.

Mr Fishell: Your Honor, this is a

motion for rehearing as to the court's prior approval of the settlement of the adversary proceeding of the Fishells v. Soltow. Much of--Much of the grounds that are alleged in the motion for rehearing have been touched upon by both Mr Turner at the hearing approving the settlement and by myself at the prior hearing on the objection to Mr Soltow's claim. Now primarily the basis for the objection and the request for rehearing, aside from the fact that we contend that the settlement was not within the realm of reasonableness, is that it's generally construed in (p3) the rules and in the case law is that the manner in which the court entered upon its consideration of that settlement proposal in reaching the conclusion that the case should be settled. Now these matters are not insignificant. This involves a substantial, probably the most substantial potential

asset that the estate held in this case.

Hearings at which settlements are made and approved are designed to be something more than just merely going along with what the trustee and the creditor have entered into on their own. It's not supposed to be something that the court approves just as a matter of form. The rule on approving settlements contemplates something in the order of an evidentiary hearing. Witnesses should be examined, if--if the issues call for it. I think there needs to be something in the record.

The Court: Didn't you have an opportunity to present witnesses at the hearing?

Mr Fishell: Your Honor, if you will recall, at the hearing, Mr Turner was present on behalf of the Debtors arguing in opposition. Now under the rule, the Trustee or the proponent of this

settlement has the burden of proving to the court, establishing adequate grounds for approval of that settlement. There were no witnesses called by either Mr Soltow or the trustee. This is the major problem that I had--that I do have with the manner in which this was approved. It's not a question of whether I can parade in 12 witnesses to (p4) testify to this, that or the other thing.

The Court: Well, one--one--Just a moment. One of the purposes of a settlement is to avoid a lot of time by the court and a lot of expense for the other parties, and that's the whole purpose of the settlement. An officer of this court has come and has presented this as being a good settlement. No creditor objected. The only ones that have objected is the debtor himself and I am not sure that

the debtor has even a position to be heard on this but we have allowed him to be heard. And he could have brought in any testimony he wanted, if he desired to do so.

Mr Fishell: Your Honor, I understand that. I believe the debtor has standing in this case. This is not a no asset case. The debtor certainly has standing to object to a settlement of this nature. Secondly, it's not the burden on the party opposing the settlement to come forward with evidence to show that the settlement should not be approved. The burden of proof is on the proponents of the settlement to establish---

The Court: No. No. No.

Mr Fishell: --in the record before the court so the court can have an adequate basis to determine whether that settlement meets the standards of

reasonableness or not. The record can't simply be devoid of anything in the way of evidence or testimony that supports the reasonableness of that settlement. And that's exactly what we had in this case, (p5) because neither Mr Nelson nor Mr Bush presented any evidence at the hearing. This is my objection. The settlement--The settlement--

The Court: This court--This court has hearings on settlement. On a motion day, we'll have several hearings on a settlement. In almost every case, as in this case, nobody shows up to question the settlement. In fact, the court has the right not even to notice out a settlement for the people to be heard. Rule 2002 does state that notice will be given to all creditors but that the court can dispense with the notice if the court deems this to be necessary. I didn't--I, in this case, I did notice

it out. But there are many settlements we don't even have to notice out. I don't know what your basis is.

What are your relying on to--What is your authority for the fact that we have to have a full blown hearing on every settlement that this court has before it?

Mr Fishell: Your Honor, I'm not suggesting that we have a mini trial of the trial of the adversary proceeding.

The Court: No. But what is your authority that we have to have a full hearing or a hearing of any kind in this?

I'll read you 2002.

"Except as provided in subdivisions.." And certain other subdivisions.

"the clerk, or some other person as" (p6)
"the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of"

And then you go down the list.

> "the hearing on approval of a compromise or settlement of a controversy, other than approval of an agreement pursuant to Rule 4001(d), unless the court--"

Got to turn the page here. I can't get the pages. Pages are stuck together. Do you want to get me another book? Do you have one down there?

Oh, okay. Here we are. Okay.

> "the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent."

So you don't even have to give the notice if some cause is shown.

There was no cause shown in this case so--

Mr Fishell: Well, your Honor, I would like to--

The court: --we did give the full notice.

Mr Fishell: Well, your Honor, I'm not complaining about the notice aspect of the hearing on the settlement, approving

the settlement. My contention is that-- it's that if the settlement is being proposed, the proponents have the burden of presenting to the court enough of the facts and circumstances in evidentiary form that would permit the record to show, would permit the court to have a basis for concluding (p7) that the settlement was fair and reasonable under all the circumstances.

The Court: Was that your argument at the original hearing?

Mr Fishell: At the original hearing, your Honor, Mr Turner was arguing in opposition to the approval--

The Court: Well,--

Mr Fishell: --of the settlement.

The Court:--did you handle the original hearing?

Mr Fishell: No, your Honor, I did not.

The court: Well, this is a motion for rehearing. How can you come in here and--

Mr Fishell: Your, Honor,--

The Court: --represent the Fishells--

Mr Fishell: Your Honor,--

The Court: --if you weren't present at the original hearing?

Mr Fishell: If your will recall, your Honor, Mr Turner did note at that hearing that I was present and in fact I was present. Mr Turner handled the argument of the hearing.

I would like to present copies of a couple of--Well, I have three or four here cases which you are free to examine regarding the standards that are to be applied by the court in considering approving a proposed settlement. (p8)

The court: Were these cited to the court at the original hearing?

Mr Fishell: I believe not, your Honor, no.

The Court: Were they available at that time?

Mr Fishell: I don't believe that I had

them in my possession at that time. If your recall, your Honor, Mr Turner submitted to you at that hearing a memorandum on the subject of Mr Soltow's counterclaim regarding slander of title. His major contention at that hearing was that there was no reason to compromise this case, certainly not for the sums that were being proposed, because the slander of title counterclaim was essentially nonexistent. If there was no slander of title counterclaim, if there was no $250,000 suit or countersuit, there was no reason for the trustee to get nervous and want to settle this case because the estate wouldn't be at risk by continuing the adversary proceeding against Soltow.

The Court: Well, we'll have to take our morning recess at this time. We will reconvene in 20 minutes.

(Court took a recess)

The Court: All right. Mr Fishell.

Mr Fishell: Your Honor, I'll provide these to you now, these cases I was referring to. In Re Lion Capital Group, 49 BR 163, In Re Correa, 123 BR 153, In Re Trout, 108 235, In Re Goldstein, 131 367, and In re Energy Co-Op at 886 F 2d 921, also In Re A & C Properties at 784 1377. Those (p 9) cases I believe illustrate the burden that's placed upon the proponent of a settlement, and what standards the court must hold them to, and what the evidence must show in order to establish an adequate basis for determining that the matter is settled in a reasonable fashion with full information as to the propriety of the settlement.

Now the settlement agreement in this case does not recite-- does not recite any of the matters respecting a number

of the issues that were raised in the Fishells; complaint including the lack of the failure of consideration for the deed in lieu of foreclosure. The documents themselves don't adequately disclose what the consideration is. It doesn't reveal in any--in any manner that the deed in lieu of foreclosure or any other documents contemplate that the right of redemption which attends every mortgage is being specifically waived. All these things that go into the issue of whether or not Fishells' original claim had substantial merit to it. The issue of usury is not addressed. Mr Turner did a very thorough analysis if the usury issue on the--in the motion for summary judgment. I think that Mr Soltow has conceded that usury was involved in various of the notes that were consolidated into the amended promissory note.

I think the transaction was one that should have been set aside.

I think the lis pendens was properly filed in the case. I don't think it supports any claim or cause of action (p10) for slander of title. I haven't seen any legal authority provided by any of the opponents that would make me believe otherwise. That was one of the things they should have established before this court as a means of apprising you of whether or not you should approve that settlement. They should have been able to show us how this slander of title claim was so viable, how much it was worth, and why the case should be compromised in the manner and in the amount that it was.

In addition, there is one other matter that was raised to me by Mr Barry Gates who is an attorney who is an attorney who is handling the

Fishell malpractice case against the Fraser law firm now pending in Circuit Court in Ingham County. And at p 3, the second--the full first complete paragraph he contends or believes, or suspects, or fears, perhaps, that that paragraph contains such a broad discharge of Mr Soltow's attorneys arising for acts arising out of the real property transaction at issue here that he fears that this may provide a defense to them in that malpractice claim. I don't see anywhere in the settlement agreement that that was contemplated by either Mr Porter or Mr Soltow, but the language is broad enough to cause him to fear that that may be the case. And, if your Honor does nothing else on this motion for rehearing, it should be at least clarified to make specific exception to that malpractice claim which I understand the Trustee intends to pursue just so that that could be

completely (p11) divorced from the settlement of this particular adversary proceeding, that should be specified in any order you make as a result of today. But I think--I think the order approving that settlement needs to be vacated. The order--The order dismissing the claim and the counterclaim discharging the lis pendens should be set aside.

The Court: All right. Mr Bush.

Mr Bush: Thank you, your Honor. Your Honor, on behalf of the Soltows, I would like to briefly make several points about this motion this morning. The first is that this is the third occasion that we have been over this same ground; that is, the settlement of the adversary proceeding. All of these arguments were made on July 10. They were made again on (August 7) under the guise of an objection to the coun-

terclaim. At that point the court properly ruled that that objection had been mooted by the earlier settlement. We are here again today. I don't think we have heard any new argument that wasn't raised at any of the earlier hearings particularly, the July 10. The purpose of a motion for rehearing is not to go over the same ground again and we object to the proceeding being used in that fashion.

With respect to the settlement itself, this is a situation in which following the conversion of the case to a Chapter 7, an experienced trustee was appointed who probably in his discretion could have settled this case rather quickly. (p12) Instead, to his credit, he chose to hire outside counsel to independently go over the case, make recommendations for settlement, and pursue negotiations to resolve the case. This took place over a period

of months. All the information was brought to the attention of the trustee and the trustee did what he felt was in the best interest of the entire estate. As the court has noted, not a single person has objected to the settlement, not a single creditor, other than the debtors who would be expected to object.

As the court further pointed out, the court has been more than fair and patient and lenient with the debtors. The court could have approved the settlement in chambers by issuing an order. It didn't do that. It noticed it out. It again heard argument not only on July 10 but again on (August 7) and again today. The court didn't need to do that but the court did that to be fair to the debtors.

I don't want to take the time to go through all the points brought up in the motion. But we think it's well within the court's experience that it is not

customary to make the trustee take the stand and be subject to cross-examination, which in this case, your Honor, I can assure you, the intent by Mr Turner would have been to grill John Porter for hours about why he did this or why he did that. We don't think that the bankruptcy court is designed to put a trustee through that type of grilling in order to get a simple settlement approved. We (p13) think that would have been improper. We think that what is going on here is an attempt to try to relitigate the whole adversary proceeding under the guise of a motion to approve the settlement. We think that's improper. So for these reasons, your Honor, we would ask that the motion be denied.

This is the third time I've been over from Lansing on this matter and I am hopeful that at this point this will be the last hearing the court will ever

have on this adversary proceeding. And that the relief, if any, for the debtors will come from the Appellate court.

This being the third time we have been over on this, your Honor, we would ask for sanctions under Rule 11. We would ask for $1,000 assessed against Mr Fishell, Roger Fishell, not against the estate. The estate does not deserve that. But we have an attorney here, actually two attorneys who are putting the court and the party through a lot of nonsense is what we believe it is and we think it ought to stop. And we would ask that the motion be denied and that sanctions in the amount of $1,000 be assessed.

The Court: Mr Nelson.

Mr Nelson: Thank you, your Honor. For the most part, I agree with Mr Bush. I think that this indeed is the third time we have covered the ground concerning the merits of the case and how it was

evaluated. Quite frankly, I have never spent as much time in my career trying to evaluate the merits (p14) of a claim and counterclaim as I have in this case. My file in this matter is a foot thick. And for all intents and purposes, it's been solely--my services have been confined to attempting to evaluate and ultimately resolve this one adversary proceeding. We went so far as to conduct a lengthy Rule 2004 examination of Richard Fishell before we ever made our final determination as to what should be done with this adversary proceeding. Suffice it to say, we have a different view of the merits than do the debtors.

The only new issue that I believe has been raised by the debtors in this motion for reconsideration is essentially the question of whether the settlement agreement whereby this adversary proceeding was resolved somehow releases the Fraser

law firm from a pending malpractice case in the Ingham County Circuit Court. I can state unequivocally that it was not the trustee's intention to release anyone from any other litigation. The intention of the trustee was to simply resolve the Soltow adversary proceeding, not to resolve in any manner the pending malpractice claim against the debtors--against the Fraser firm. I believe that Mr Bush shares that interpretation of the settlement agreement that indeed it does not release, or somehow resolve, or discharge the malpractice action. For the record I should state, however, that the Trustee has not made a determination whether the estate intends to pursue that action or not. Quite frankly, we have not even begun to evaluate the (p15) merits of that case. And I guess that's something that's left for the trustee and counsel to do on another day. But, to clarify, I guess

the impact of this settlement agreement on that other litigation, I would ask that Mr Bush indicate to the court the interpretation of his law firm with respect to whether or not it is somehow released from any potential liability under that Ingham County Circuit Court action.

Mr Bush: I agree with Mr Nelson, your Honor. The intent of this settlement was to have nothing to do with the malpractice case. We studiously attempted to keep them separate, primarily for the benefit of our client, Mr Soltow. There may be some issues that are related, obviously if you look at the complaint and the two cases, they all say about the same thing. That Mr Fishell didn't understand these documents and so forth when he entered into them. There may be some questions interms of res judicata of the decision that Judge Eveland made back in Ingham County Circuit court back in 1990 but, as far as this

settlement agreement, we do not view that as releasing ourselves from that Ingham County malpractice litigation.

The Court: Anything further, Mr Fishell?

Mr Fishell: Just briefly to reiterate, your Honor. I think that it's unfortunate. Personally, I believe this--this whole thing should have been resolved otherwise. But, aside from that, forgetting that for a minute, in order for (p16) the court to appropriately determine a proposed settlement, the court must do something more than rely upon essentially what are little more than general representations made by the proponents of the settlement. In order for the court to validly determine the reasonableness of a settlement, it must make some independent examination of the facts and the circumstances surrounding the case and what the trustee went through in arriving at his conclusion. That wasn't done in this case. That's the

reason for the motion. That's the reason that this matter should be set aside and reheard.

Thank you, your Honor.

The Court: This case comes before the court for a hearing on a motion by Richard L. Fishell and Dorothy M. Fishell for a rehearing or a reconsideration of the previous order of this court approving a settlement of adversary proceedings between the debtors and Robert Soltow and Rosalie Soltow.

The underlying proceedings in this case commenced sometimes prior to the filing date of this case. There was a case pending in the state court, as I recall, and had been pending for some time at the time that this voluntary Chapter 11 proceedings was filed by the Fishells with this court. That adversary proceeding was brought over from the state court to this court as an adversary proceeding and has been pending

ever since until the attempt to settle the proceedings after the Chapter 11 case had been converted to a case under Chapter 7.(p17) The original case, as I recall, and it's been so long now I may be a little hazy on the facts, but it involved a mortgage or land contract, I don't remember which, between the Soltows and the debtors. There had been nonpayment on the mortgage--or it's a land contract--for some time and finally there had been a foreclosure proceedings commenced. And, as a settlement of that foreclosure proceedings, there was worked out a proceedings where the Soltows executed a dicharge of the mortgage in question. I guess it must have been a mortgage now because I think it was a discharge of the mortgage, or maybe it was a quitclaim deed, I can't remember which, but one of the two. And also the debtors executed a deed to the property in question. These documents

were turned over to Transamerica Title Company, as I recall, a completely disinterested party. And the agreement was that if a payment was not made on the-- or if the mortgage was not paid, the American Title Company would turn over the deed to Mr Soltow. If the money were paid, then the title company would turn over a full discharge to the Fishells. The money was not paid and the American Title Company did turn the deed over to Soltows. So there was a deed on record from the Fishells to the Soltows and this was duly recorded. And then this proceedings, the adversary proceedings was then brought in the state court to set aside the deed and to indicate that it was actually a mortgage. The case was--lingered for a long time in the state courts and then was (p18) brought into this court.

There was delay, after delay, after delay.

The court did everything possible to try to move this case along but everytime that the court would take some action, there would be counteraction by the Fishells and their attorney to delay the matter further. Finally we had a pretrial on the proceedings. One of the things that came up at the time of the pretrial was a matter of a jury trial. And here again the court felt that there was no right to a jury trial under these-- under the provisions, and the court held that we would proceed and a trial date was set, we would proceed with a speedy trial. However, before the trial date came, there was an appeal taken to the District Court, as the Fishells had the right to do, on the matter of the jury trial. That matter lingered for some time before the District court and eventually the District Court affirmed the bankruptcy court and returned the matter to

the bankruptcy court.

And then I can't remember just what happened after that but somewhere along the line there was a transfer of the case to case under Chapter 7. And I believe that when Mr Porter got into the matter, for the first time there was progress made and for the first time the matter was brought to a settlement. Mr Porter felt that under the circumstances he should obtain an expert bankruptcy attorney. He retained Mr Nelson's firm. Mr Nelson did agree to handle the case. As Mr Nelson (p19) has indicated here today, he spent a lot of time investigating into whether or not there should be a settlement and there were a lot of reasons for the settlement. And the court felt that the settlement was reasonable and the court approved the settlement.

Since then, we have had--the Fishells

have objected to the settlement. They're the only ones that have objected, the debtors themselves. And not one creditor objected.

The whole purpose of the right to settle proceedings especially in the bankruptcy court is to prevent what has happened here, untold amount of fees that have been generated because of the tremendous number of delays that have taken place in this court and not only in the adversary proceedings but in other ways.

So this court is satisfied that there is no basis for the objection. The court feels that the only thing that this hearing today has caused is more expenses, more reason why the creditors of the Fishells would not receive any funds on hand. Not only has the estate had more fees run up by reason of the attorney, the appearance of the attor-

ney and the appearance of the trustee in this--at this hearing, but also Mr Soltow, he's had ample expenses. He's had to pay the taxes on this property over all this time. I have not heard that the Fishells ever claimed that they were the persons that should pay the taxes. I don't think they have paid them. I (p20) think, as I recall, the testimony was that Mr Soltow has paid all the taxes, all the expenses on the property. Not one cent has been paid by the Fishells, at least there's been no testimony in that court--in this court to that effect. So the court would hold that the motion for reconsideration is dismissed and denied.

Now the question comes up as to sanctions. Mr Bush has asked for sanctions. Certainly the estate should not have to pay more money of the creditors for the expense that has

been incurred in getting ready for this hearing and for the holding of the hearing itself. The only thing here is of course Mr Nelson didn't have to come from Lansing as did Mr Bush. So I guess now, Mr Fishell, the court would ask you, is there any reason why sanctions should not be imposed under Bankruptcy rule 9011, Rules of Civil Procedure 11?

Mr Fishell: Well, your Honor, as I understand that rule, that requires something to be done that is unnecessarily--unnecessary and basically frivolous. None of the arguments that I have advanced either today or the last time that I was here should be categorized in that nature.

The Court: We're not talking about any sanctions for any hearing except the one today. You had the perfect right to make the hearings the last

time but this time we are re-- as far as the court can determine, we are just going right over the same materials, the same matters that we had before.(p21)

Mr Fishell: I understand that, your Honor. But one of the purposes of a motion for rehearing is to offer you an opportunity to correct something that you may have made a mistake about the first time, even if it's not something new and completely different. I mean, why would you have a rehearing if you had to dredge up something new that you didn't argue the first time? That wouldn't --That wouldn't make any sense. You might--could--You might be faced with the argument if you didn't raise it before, it was waived. So one of the purposes of a rehearing, to my way of thinking, is to point out to the court where they made a mistake

the first time. That's perfectly proper. It's perfectly reasonable.

Now I agree that when I was here the prior time on the objection to claim, that matter was set by the court and I appeared. I came from Florida. I came from Florida again today. This hearing today is perfectly proper. It's provided for by the rules. If nothing else, we have addressed an issue in the - in the settlement agreement that we didn't cover before. Mr Bush and Mr Nelson have both acknowledged that that point on that point that there was no intent to abandon or compromise the malpractice claim. That was the basis of my argument on that point. And I still--I stand by the arguments that I have made today. I have made them in good faith. I believe the law supports the positions I have taken. This (p22) is not some-

thing that I have come here merely for the purpose of delay or expense because I have had to be put to some expense of my own. And that's why I don't think that any--anything in the nature of sanctions are appropriate.

The Court: Mr Nelson.

Mr Nelson: Well, your honor, as I indicated in my prior remarks, the only thing that I saw that was new in the motion for reconsideration was this, I guess, request or issue raised as to how does this settlement attempt to affect the malpractice case? But I don't think that was necessary because I mean there was no-that was not an issue as between the trustee and Mr Soltow's counsel. We understood how it affected that case. It didn't affect that case. It was never intended to affect that case. It seems that this was an issue or a

question only in the minds of the Fishells; it certainly wasn't a question in our mind. Nothing has really been clarified that--except perhaps to the debtors. It was already clear, there was a clear understanding between us and the Soltows and the counsel.

Mr Fishell: Your Honor, if I could respond to that. As I mentioned earlier it was Mr Gates who is the attorney who was hired by the Fishells to prosecute that malpractice claim who when he received this sometime after it was approved raised this issue with me. I made that a part of my motion because of his concerns. Now, if for some reason the (p23) trustee were to abandon that case to the Fishells, then cetainly the Fishells would have an interest in knowing and having it clarified, because how--what would be-

what would prevent the Fraser firm from raising that issue as a defense in the circuit court case if it ever came to that? Now it's fine that the trustee and Mr Bush recognize between themselves the meaning of it. Mr Gates was concerned, that's the reason it was raised. And if there is something that can be made a part of the order today that clarifies that point, I think that would serve the interest of all in the end.

The Court: I'm not clear. Is the malpractice suit, is that an asset of this estate? That--Isn't that for things that happened after the filing of the original petition back in 19--Let's see.--1990?

Mr Bush: Your Honor, what has been alleged is arises out of the same nucleus of operative fact as does the adversary proceeding. In other words,

the allegation is that when these documents were drawn in '88, the escrow agreement that the attorney for my firm who did that, Mr Austin, did so improperly and in a way the Fishells contend was malpractice.

The Court: Does this go back to '88?

Mr Bush: Yes

The Court: Longer than I thought. Four years.

Mr Bush: Your Honor, we think that case is probably more frivolous than this case, given that Judge Eveland (p24) in the state court has already entered a three page opinion after hundreds of pages of testimony finding no improprieties on the part of our firm.

The Court: But that was before the filing so it would be an asset of this estate.

Mr Bush: Interestingly, your Honor, that that case was filed prior to the

bankruptcy filing, was not disclosed, was concealed from this court at the time of the bankruptcy filing and only came up upon further discovery and an amended schedule. So this is also something that bears on this.

Mr Fishell: Your, honor, there is--there was never--That's been an allegation all along that was willfully concealed. That's not the case. But the suit was--

The Court: Well, it was put in the schedules then?

Mr Fishell: It was omitted from the original schedules, that's correct, your Honor. He is correct on that point.

The Court: Well, it was concealed then. The schedules were signed under penalty of perjury.

Mr Fishell: That's correct, your Honor. But there is--I deem a difference bet-

ween inadvertence and concealment. That's the point I was trying to make. But this suit was commenced prior to the petition being filed.

The Court: It shows they didn't think much of, their suit to start with.(p25)

Well, the court is of the opinion that sanctions should be imposed upon counsel and sanctions will be allowed in the sum of $1,000 for the payment of the fees and expenses of Mr Soltow. And the court, as the court has stated, certainly the creditors should not have to pay for this unnecessary proceeding. And so the court would indicate that there shall be paid to the estate the sum of $500 to cover preparation and the attendance of this proceeding by Mr Nelson.

Mr Nelson, would you prepare the orders for the Court?

Mr Nelson: I will, your Honor. Am I

correct on the sanctions are on the debtors' counsel?

The Court: On Mr Fishell. Roger Fishell.

Mr Nelson: Okay. I will prepare the order, your Honor.

The Court: I assume that he's the one that signed the motion. Mr Turner did not sign the motion.

Mr Bush: That's correct, your Honor.

Mr Fishell: That's correct, your Honor.

Mr Bush: Thank you, your Honor.

The Clerk: How about the other one, Judge?

The Court: Pardon?

The Clerk: The other Fishell matter.

The Court: Oh, we have another Fishell. Well, that matter is moot now. That was for a stay pending the (p26) court's determination of the reconsideration. Since the court has already done that

and disposed of that matter, that matter is moot.

Mr Bush: Thank you, your Honor.

Mr Fishell: Thank you, your Honor.

Mr Nelson: Thank you, your Honor.

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REPORTER'S CERTIFICATE

I, Gail L. Beach, do hereby certify that the foregoing is a true and accurate transcript of the hearing held on Friday, August 21, 1992, at Grand Rapids, Michigan, before the HONORABLE DAVID E. NIMS, JT., U. S. Bankruptcy Judge, consisting of 26 pages.

___/s/_____
Gail L. Beach, CSR2574
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UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

Richard L. Fishell and

Dorothy M. Fishell

Case No NG90-85144

Debtors

Richard L. Fishell and

Dorothy M. Fishell

Plaintiffs

vs Adv Proc No 91-8015

Robert Soltow and

Rosalee Soltow

Defendants

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ORDER

At a session of said Court, held in the City of Grand Rapids, Michigan, this 24th day of July 1992.

PRESENT: HONORABLE DAVID E. NIMS JR.

U.S. BANKRUPTCY JUDGE

The Debtors, Richard L. Fishell and Dorothy M. Fishell, having filed a document on June 22, 1992 entitled Objection to Claim, the same pertaining to a certain slander of title claim raised by Robert Soltow in the above referenced adversary proceeding, said Debtors' Objection having come on for hearing before the court on July 22, 1992, the court having heard oral argument and having otherwise been fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the aforementioned claim by Debtors is moot because of the court's July 10, 1992 approval of settlement of the adversary proceed-

ing, said settlement including disposition of the slander of title claim made by Robert Soltow. The request for sanctions made by counsel of Robert Soltow is hereby ordered held in abeyance pending hearing on a motion for reconsideration/rehearing filed on behalf of the Debtors.

____/s/_____
David E. Nims, Jr.
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and Case No 90-85144

DOROTHY M. FISHELL

Debtors

_____/

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Adv Pro No 91-8015

Plaintiff/Appellants

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants/Appellees

_____/

Harold E. Nelson
Attorney for Trustee, John Porter
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

_____/

AMENDED

MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER APPROVING SETTLEMENT

Pursuant to Rule 9023 of the Bankruptcy Rules of Procedure the Debtors move the court for rehearing and/or reconsideration of the order of this court entered on the 14th day of July 1992 wherein the court approved the settlement of the above styled adversary proceeding and the Debtors show as grounds:

1. The court failed to conduct even the most rudimentary evidentiary inquiry into the merits of the Trustee's motion or the legal issues raised by the complaint and counterclaim.

2. The court failed to require any support, by way of citation of legal authority, for the position adopted by the

Trustee on any legal issue raised by the complaint or counterclaim. The failed entirely to consider the legal argument presented by the attorney for the debtors when offered at the hearing.

3. The court failed to consider significant legal issues raised by the complaint such as usury, the circumstances surrounding the execution of the documents on 25 August 1988 and the role of the Soltows'/ Fishells' common attorney in procuring same; the law regarding the construction of deed as mortgage when given under circumstances of this case; misinformation and misrepresentation concerning the documents and their legal effect and the issue of fraud. Further, the court failed to consider the substantial absence of merit associated with the counterclaim for slander of title in that neither the Trustee nor Soltows presented any legal authority for the proposition that the

filing of a lis pendens would serve as any basis for such a claim. Further, the Trustee and Soltows failed to note any statutory basis for such a cause of action.

4. The arguments advanced by the Trustee and Soltows were couched in generalities and were speculative in nature. Insufficient evidence was offered to support any of the reasons advanced in support of approval of the settlement.

5. The court's ruling, announced orally at the conclusion of the argument, conceded the possibility of error in recollection and focused primarily on the origin of the Fishell/Soltow dispute in 1988. The court focused only on its having originated as an agreement and did not consider the circumstances alleged in the complaint which would have vitiated any such agreement.

6. The court failed to require any

concrete showing from the moving parties which would have been sufficient to meet the test of reasonableness required for such compromises and the court failed to adequately apprise itself of sufficient facts upon which to render an informed decision as to any aspect of the complaint or counterclaim. In particular, the court was provided with no support for the purported slander of title claim nor how Soltows' damages, if any, might be estimated.

7. The court misapprehended the purpose and effect of the lis pendens, failed to consider how Soltows' might have mitigated any "damages" suffered and failed to note how any such damages are limited by the applicable statute.

8. The slander of title claim was not adequately considered by the court or the moving parties and its lack of merit was of particular significance.

Without a slander of title claim, the estate was not at any arguable risk should the litigation continue. The court should have given greater attention to this issue particularly where an objection specifically directed to that claim was noticed for hearing before the court.

9. The court, in its oral ruling, focused also on what it considered delays and speculated about future delays. This was not warranted given that the trial was set for August 1992. The reference to delay attending the appeal of the jury issue was also unwarranted because it was a meritorious issue which the debtors raised.

10. The settlement requires clarification to the extent that it may have any effect on the legal malpractice claim pending in the Ingham County Circuit Court. To the extent that the settlement and the

order approving it may be construed as relieving the Fraser law firm of liability on such claim, the settlement and court approval was entirely in error, was without consideration, was without appropriate notice and was without explicit factual or legal basis.

Wherefore, the Debtors pray the court to grant any and all relief appropriate with respect to the order of 14 July 1992, including but not limited to vacating the same in its entirety, and to grant any and all relief appropriate under Rule 9023.

__/s/_____
Roger L. Fishell
1900 Main Street, Suite 214
Sarasota, Florida 34236
(813) 351-2883
Attorney for Debtors

(Certificate of Service Omitted)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Case No N90-85144
HON DAVID E. NIMS JR

Chapter 11

_____/

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Plaintiffs

Adversary No 91-8015

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants

_____

Harold E. Nelson
Attorney for John Porter, Trustee
of the Estate of Richard L. Fishell
and Dorothy M. Fishell, Debtors
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

STIPULATION AND ORDER OF DISMISSAL AND CANCELLATION OF LIS PENDENS

The parties hereby stipulate and agree that the above-referenced adversary proceeding having been amicably resolved pursuant to Release and Settlement Agreement of June 12, 1992, thesame being incorporated herein by reference, the same shall be dismissed with prejudice and without costs to any party. The parties further hereby stipulate and agree that a certain Notice of Lis Pendens, described in the aforementioned Release and Settlement Agreement and recorded in Liber 795, Page 409 with the Eaton County Register of Deeds on May 1, 1989 with respect to certain real property described in the aforementioned Release and Settlement Agreement is hereby can-

celled.

_/s/_____	__/s/_____
Harold E. Nelson	Mark A. Bush
Attorney for	Attorney for Soltows
Trustee of Fishells	
Dated: 7/14/92	Dated: July 13,1992

ORDER

At a session of said Court, held in the City of Grand Rapids, State of Michigan this 20th day of July, 1992.

PRESENT: HONORABLE DAVID E. NIMS JR., U. S. Bankruptcy Judge

Upon reading and filing the Stipulation of the parties hrein and the Court being fully advised in the same:

IT IS HEREBY ORDERED that the above-referenced advesary proceeding having been amicably resolved pursuant to Release and Settlement Agreement of June 12, 1992, the same being incorporated herein by reference, the same shall be and are hereby dismissed with prejudice and without costs to any party.

IT IS FURTHER ORDERED that the Notice of Lis Pendens recorded in Liber 795, Page 409 Eaton County register of Deeds on May 1, 1989 is hereby cancelled.

__/s/_____
DAVID E. NIMS JR.
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Case No N90-85144
HON DAVID E. NIMS JR

Chapter 11

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Plaintiffs

Adversary No 91-8015

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants

Harold E. Nelson
Attorney for John Porter, Trustee
of the Estate of Richard L. Fishell
and Dorothy M. Fishell, Debtors
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

STIPULATION AND ORDER OF DISMISSAL

OF COUNTER-CLAIM

Now come the parties hereto, by and through their attorneys, and hereby stipulate and agree that the above-referenced adversary proceeding having been amicably resolved, the counter-claim brought by Defendants Robert Soltow and Rosalee Soltow against Debtors Richard L. Fishell and Dorothy M. Fishell shall be dismissed with prejudice and without costs to any party.

___/s/_____	__/s/_____
Harold E. Nelson	Mark A. Bush
Attorney for Trustee of Fishells	Attorney for Soltows
Dated: 7/14/92	Dated: July 13,1992

ORDER

At a session of said Court, held in the City of Grand Rapids, State of Michigan this 17th day of July,

1992.

PRESENT: HONORABLE DAVID E. NIMS JR.,
U. S. Bankruptcy Judge

Upon reading and filing the Stipulation of the parties herein and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the above-referenced advesary proceeding having been amicably resolved, the counter-claim brought by Defendants Robert Soltow and Rosalee Soltow against Debtors Richard L. Fishell and Dorothy M. Fishell shall be dismissed with prejudice and without costs to any party.

__/s/_____
DAVID E. NIMS JR.
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In Re: Chapter 7

RICHARD L. FISHELL AND
DOROTHY M. FISHELL
Debtors Hon David E. Nims Jr.
Case No NG90-85144

ORDER GRANTING TRUSTEE'S MOTION

TO APPROVE SETTLEMENT

At a session of said Court held in the U.S. Bankruptcy Court, for the Western District of Michigan, this 14th day of July 1992.

PRESENT: HON DAVID E. NIMS, JR.
U.S. Bankruptcy Judge

The Trustee's Motion to Approve Settlement, filed June 12, 1992, having come before the court for hearing on July 10, 1992, and the court being familiar with the pleadings and other matters of record appearing in the court's file in this case and in the adversary proceeding which is

the subject matter of the Trustee's Motion, the court having heard argument of counsel, and the court being otherwise fully advised in the premises;

NOW, THEREFORE, for the reasons stated on the record at the hearing, IT IS HEREBY ORDERED that the proposed settlement between the Trustee and Robert and Rosalee Soltow, which is more fully set forth in the Release and Settlement Agreement dated June 12, 1992 between said parties, be and hereby is approved and authorized, nunc pro tunc to the date of the hearing, July 10, 1992.

IT IS FURTHER ORDERED that a copy of this Order be served by ordinary mail upon the following: Gary C. Rogers, Fraser, Trebilcock, Davis & Foster, P. C. 1000 Michigan National Tower, Lansing, MI 48933; Robert and Rosalee Soltow, 13665 Tallman Road, Eagle, MI 48822; Lester N. Turner, Esq., 1005 Timber Pass, Harbor Springs, MI 49740; John A. Porter, Esq., 622 Commerce Building, Grand Rapids,

MI 49503; Richard L. and Dorothy M. Fishell, 13625 Tallman Road, Eagle, MI 48822; and US Trustee, 190 Monroe Avenue, NW, Suite 200, Grand Rapids, MI 49503

_____/s/_____
Hon David E. Nims, Jr.
U. S. Bankruptcy Judge

Return Service Copies to:
Harold E. Nelson, Esq.
500 Calder Plaza Building
250 Monroe Avenue, NW
Grand Rapids, MI 49503

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

Richard and Dorothy Fishell

Case No NG90-85144

Debtors

Richard and Dorothy Fishell

Plaintiffs

vs Adv Proc No 91-8015

Robert and Rosalie Soltow

Defendants

Hearing on the Trustee's Motion to Approve Settlement in the above-entitled matter taken on the 10th day of July 1992, at the Federal Building, Grand Rapids, Michigan, before the Honorable David E. Nims, Jr., U. S. Bankruptcy Judge.

APPEARANCES

On Behalf of Plaintiffs:

Lester N. Turner
Attorney at Law
1005 Timber Pass
Harbor Springs, Michigan 49740

On Behalf of Defendants:

Fraser, Trebilcock, Davis & Foster
Attorneys at Law
By: Mark A. Bush
By: Gary C. Rogers
1000 Michigan National Tower
Lansing, Michigan 48933

On Behalf of the U. S. Trustee

Clary, Nantz, Wood, Hoffius, Rankin and Cooper
Attorneys at Law
By: Harold E. Nelson
500 Calder Plaza
Grand Rapids, Michigan 49503

Also Present:

John A. Porter, Trustee
622 Commerce Building
Grand Rapids, Michigan 49503

Robert Soltow

July 10, 1992

* * *

The Clerk: Richard and Dorothy Fishell

The Court: This case is before the court for a hearing on the trustee's motion for the approval of proposed settlement between the trustee and Robert Soltow and Rosalie Soltow. The record may indicate the appearance of Mr Harold E Nelson representing the trustee. We have mr Mark A Bush the attorney for the Soltows, and is Mr Roger Fishell here?

Mr Turner: He's not here to argue today, Your Honor.

The Court: Pardon?

Mr Turner: He's not here to argue today, no.

The Court: Is there anyone--

Mr Turner: I'm appearing.

The Court: Is Richard L. Fishell present?

Mr Turner: My name is Lester N. Turner. I'm appearing on behalf of the Fishells, Your

Honor.

The Court: Oh, Roger Fishell, apparently, signed as attorney in the filing of an objection. So, Mr Turner, you are representing the Fishells now?

Mr Turner: I'm here representing them

today for the purposes of arguing this motion, Your Honor.

The Court: You're here representing them?

Mr Turner: Yes, that's correct.

The Court: Okay, Mr Turner. Are there any other appearances? Apprently not. Mr. Nelson.

Mr Nelson: Thank you, Your Honor. As a preliminary matter, I should point out to the court--

The Court: By the way, can this matter be disposed of within an hour?

Mr Nelson: Certainly my portion of it can, Your Honor. I can't speak for the other counsel.

The Court: Mr Bush.

Mr Bush: Certainly, Your Honor.

The Court: Mr Turner.

Mr Turner: Depends on how much they--time they take, Your Honor, but I would think we can do it within an hour.

The Court: I'm going to have to spread it out. Now, how many do we have to hear? Three?

Mr Nelson: I believe so, Your Honor.

The Court: It will be 20 minutes a piece.

Mr Turner: Actually, we have two from one side, Your Honor, and one from the other, so I presume they can split their 30 minutes, and I can have my (p. 5) 30 minutes?

The Court: Each of you have 20 minutes.

Mr Turner: Okay.

The Court: All right. Mr Nelson.

Mr Nelson: Thank you, Your Honor. As a preliminary matter, I should point out to the Court that the underlying release and settlement agreement entered into between

the trustee and the Soltows, which is before the court for approval today, had a couple of legal descriptions attached to it as Exhibit A and Exhibit B. It's come to the parties' attention that Exhibit A and Exhibit B, when they were attached to the agreement, were, in fact, reversed, and the parties understand that and agree that that, in fact, for purposes of accepting the release and settlement agreement, those exhibits will be, in fact, reversed. And I don't think that presents a problem for the court here today.

Your Honor, with respect to the motion to approve the settlement under Bankruptcy Rule 9019, I would like to state that both the trustee, in his own right and through our office as his counsel, has spent a great deal of time and effort investigating the background and the merits of both the claim and the counterclaim that are pending with reference to the (p. 6)

adversary proceeding that we're trying to settle here today. That adversary proceeding, I think, was commenced originally in the State Court, was--when the Fishells filed for Chapter 11, was removed to this Court and was prosecuted and defended by the various parties during the Chapter 11 phase of this case, which lasted for a little over a year, the case having converted to Chapter 7 several months ago.

Based on that relatively exhaustive investigation, the trustee has determined that this settlement is in the best interest of the creditors and bases that determination on the fact that there is a significant litigation risk from the estate's perspective in pursuing the adversary proceeding. This--I believe, that the court is relatively aware of the facts of the adversary proceeding litigation, and there are complicated facts, and also fairly complicated legal

issues are raised.

Your Honor, just reading the various briefs that had been filed during the course of this adversary proceeding consumed many hours. As the Court may appreciate, those briefs are voluminous. That alone indicates the complexity of the factual and legal issues.

Our belief is this Court has denied motions (p.7) for summary judgment brought by the parties, which also indicates that there are certainly disputed issues of fact that have to be resolved here. It's difficult to assess, with any degree of precision, the exact litigation risk, because the case is so factually intensive. It ultimately depends on which set of witnesses the tryer of fact ultimately believes.

However, if the estate were unsuccessful in pursuing this litigation, a very large claim by the Soltows would end up

being--would result against the estate, and it's quite possible that the bulk of that claim would be administrative in nature, because of the fact that the slander of title counterclaim that the Soltows have brought, many of the time--much of the time, when that title was allegedly slandered, occurred while the Debtors were official possessors in the Chapter 11. In the risk of additional litigation, the trustee has taken into account the inevitable delay in litigation. Although the adversary proceeding, I believe, is scheduled for trial in August, I think this court has observed on the record in the past in this case that an appeal is virtually certain. In fact, I think there's been one or more appeals in connection with this adversary proceeding already. So we would be measuring the time frame for resolving this case (p.8) probably in years, rather

than months or weeks.

The cost of the litigation is another factor that the trustee relies on. This is clearly going to be a hotly contested adversary proceeding, and as I mentioned before, both the legal and factual issues are very complicated and numerous. It will be a very expensive lawsuit to try, win, lose or draw.

Another factor that the trustee is taking into account, as he is required to take into account as the standards that have been developed by the courts under the Rule 9019, is the paramount interest of the creditors of the estate. The posture of this case is such, Your Honor, that the claim on file against the estate by the Soltows will be completely eliminated by this settlement. That represents the single largest claim against the estate, Your Honor. The other assets of the estate, outside the adversary proceedings, should

be sufficient, once we eliminate the Soltows' claim, to return a substantial dividend to the remainder of the creditors. And not having to go through the time consuming process and cross-legged process of litigating the adversary proceeding, that substantial dividends should be able to be returned to the creditors relatively promptly, and, Your Honor, for all of those reasons, the trustee asks that the(p.9) settlement be approved.

The Court: You only used up five minutes of your time. All right. Mr Bush, can you do as well?

Mr Bush: Thank you, Your Honor. For the record, Mark Bush on behalf of Robert and Rosalie Soltow. Mr Soltow's in the court with us today. Bankruptcy Counsel Gary Rogers is also with me today. I'm trial counsel on the adversary proceeding.

Your Honor, my perspective on this matter is, having lived with this case longer than

anyone else has, since April of 1989 when it was filed, we strongly support the position taken by the trustee in this matter, both as defendants in the adversary proceeding and, as indicated, the largest creditor.

We should point out that the settlement arrangement has an important contingency, and that contingency is that it is subject to approval today by the court. In other words, if the court were not to approve the settlement today, there is no agreement for this settlement to otherwise proceed. One of the reasons for that, Your Honor, is we are faced with an August trial date which is going to require substantial preparation, and we need to get a determination from the trustee and the court--

The Court: How many days are set for the(p.10) trial?

Mr Bush: Well, I believe, approximately a week, give or take a few days.

The Court: One week.

Mr Bush: So it's very important that we get a resolution today, if possible. The trustee has studied this matter through counsel extensively, like he has indicated. Counsel has taken copious information from our side of the case and, I presume, from the other side of the case, as well. So it's a very knowledgeable type of decision that the trustee and counsel has made.

I'd like to make five principle points in terms of why, from the standpoint of Mr Soltow, and for everybody else for that matter, the settlement is a good idea for the estate, for the creditors and for all concerned.

The first was alluded to briefly, and that is additional delay that would be engendered by allowing the litigation to proceed. As I've indicated, this case has been around since April of 1989. It has been before three different judges, Judges Eve-

land, Stevenson, and Your Honor. We've had hearings in four different courtrooms in Charlotte, Hastings, Lansing and Grand Rapids. It was scheduled for trial, the(pll) court may recall, originally last August. We now have a trial date of this August. If, for some reason, the case continued and couldn't be tried at that time, I presume, given the court's retirement, Your Honor's retirement, we would have a fourth judge in this case.

This piece of property has been tied up now for over three years, and no one has been able to do anything useful with it. This case has had more adjournments than any case I've ever handled. It seems like anytime we get to a depositive point in the case, someone wants an adjournment.

We believe that if the case were continued, these delays would go on. There certainly would be an appeal. There have already been appeals all the way through the

Michigan State decision, on a decision made by Judge Eveland. There's been an appeal on the Federal System on a Court's decision that a jury trial may, as been requested by the debtor, would not be improper, and we just think that that pattern would continue for years and years and years, based upon the attitude of the parties and the attorneys who have handled it. We don't think that's in anyone's best interest to string this case out to 1993, 1994, 1995. We believe that the delay, alone, which would prevent the administration of the estate, is reason enough for the Court to approve (p.12) the settlement, apart from everything else that's been mentioned.

Reason number two, Your Honor, the estate. The expense in litigating this case for everyone has been overwhelming. No doubt they would continue. The largest single expense would be the trial, and preparation for the

trial, by both sides, and the appeal. That could run into six figures for the estate, for everyone else. We think that given the circumstances presented, the expense, alone, for the litigation to continue, and the burden that that would place upon the creditors in the estate is sufficient reason alone for the court to approve this particular settlement.

The third reason, Your Honor, is the exposure which the case presents to the court--I'm sorry, to the estate and to the creditors. In State court, we filed, at the time that the lis pendens was filed in the property, a counterclaim for slander of title. The court, using the court's own language from an earlier hearing in this case, has recognized, and I quote the Court, "And this is the matter that has been mentioned by counsel for Mr Soltow that has been holding up any disposition of any property and is probably causing

very much damages to Mr Soltow and--(p13) if he prevails eventually, and will mean a lot of expenses and a large claim to be decided in this case." That's from the hearing of January 31 of this year, which is absolutely true. Should Mr Soltow prevail in the adversary proceeding, he intends to vigorously and fully prosecute that slander of title claim.

This piece of property has been dormant, as I've indicated, for over three years. It will remain dormant until the case is tried, if it needs to be tried. He's lost any opportunity to develop it for three years. He's lost any opportunity to use it himself. No one will touch this piece of property as long as this adversary proceeding continues. His legal expenses have been enormous, and we can guarantee the court that that slander of title counterclaim would not only be in the six-figure range, probably would be over a half-of-a-

million dollars worth of exposure to the estate. We don't think it's necesssary that the estate bears that risk and that exposure if the case can be resolved in terms that the trustee and we believe to be reasonable and favorable, and that's what we're presenting to the court today.

The fourth reason, Your Honor, is that the settlement which has been proposed requires a cash payment by Mr Soltow to the estate in the amount of (p.14) $2,000. Now, in a case of this magnitude, that may not strike the court as enormous. However, Mr Soltow feels very strongly that given the lack of merit in the primary case presented against him, that, in fact, constitutes quite a fair amount of consideration for a claim that we believe is as specious as it is. We believe that that amount of consideration, alone, would warrant the trustee recommending approval to the court.

Definitely, Your Honor, it's important for all of us to remember that even if the Fishells were somehow to prevail in the adversary proceeding, which we think is fairly unlikely, this would mean that Mr Soltow would still have to have a mortgage on this piece of property. There has been some dispute and debate in terms of how much that mortgage would be, and it would depend on how the interest is calculated.

The mortgage specifically reserves attorneys fees and collection costs. We believe that if the Fishells were to prevail in this matter, the amount of the mortgage would be over $1 million. We think it's highly questionable whether the value of that property in today's depressed real estate market would exceed that, it at all, and possibly would not exceed that number. We think that this is a very important factor to take into account. In other words, (p 15) the case could be fully

litigated, and there would still be no benefit to the Fishells.

Finally, Your Honor, we do have a question of standing, and I've pointed this out in my brief in support of the motion. The case law has indicated it's highly questonable whether, in circumstances such as this, the debtors even have standing to question the wisdom of the trustee, who has exclusive control and authority over the course of the adversary proceeding, and standing to object to a motion of this type. The case law is not totally clear, but it seems to depend upon whether the debtor is insolvent.

So, we think, for all the foregoing reasons, the settlement is very appropriate, and should be approved today. To the extent the other side would even have standing, that being the debtors, to object, there's been no formal objection filed. There has been an objection filed to Mr Soltow's

claim, which has been noticed on for a week or two from now. We think that the court's ruling today will moot that objection, and we can get this case wrapped up and get this estate administered properly. Thank you very much, Your Honor.

The Court: Okay. Mr Turner.

Mr Turner: Your Honor, on behalf of the (p16) Fishells, I might want to point out to the court that Mr Fishell is not here today because he had unscheduled surgery on Tuesday, and I guess to show the proper attitude of counsel on the other side, we've requested to adjourn this until Mr Fishell is out of the hospital, and that was refused. And the reason given for the refusal was there was a drop dead date on the settlement as of today. I can appreciate Mr Soltow's attorneys wanting a drop dead date as of today, because the court has set the objection of their claim for July 22nd, and I would assume they want to

try to avoid that project, not because of the time, but because of the likely result.

I think that it appears from both previous counsel that the real guts to this thing as to why they want this settlement approved is because of this horrendously large claim that they're going to have in their counterclaim for slander of title. It's interesting that neither counsel have cited any case authority to support this great recommendation as made to the court on settling this alleged counterclaim.

I think if the trustee in bankruptcy was concerned with this counterclaim, he should have brought a motion for summary disposition, and maybe he would have been relieved of any fears that he had (p 17) concerning the counterclaim.

I think that two things are evident. One is that the law, generally, in the United States is that filing a lis pendens privilege so you can't slander the

title. Michigan has not looked at that issue in that light at this time. Michigan does have some case, though, that are very interesting on that issue. One of them is Kauffman v Shefman, which is 169 Mich Appeal 829, which is a 1988 case, where there was a malicious prosecution claimed because a lis pendens was filed. The court held that an action could not be maintained for malicious prosecution by the filing of a lis pendens, and the court went on to say, "Notice of lis pendens serves an important public purpose by protecting the right to litigation involving real property and protecting prospective purchasers by apprising them of disputes regarding rights in the land. These policies should not be thwarted while allowing the filing of a notice of lis pendens by an ultimately unsuccessful litigant to constitute grounds for a malicious prosecution action. Such a result would be contrary to the policy announced by our

Supreme Court in Friedman: to refrain from intimidating those seeking to adjudicate their claims in the courts. Accordingly, we hold that the filing of a (p. 18) notice of lis pendens in this case is not equivalent to a seizure of property for purposes of a malicious prosection claim." And it's not like filing a claim.

And the only case that I could see that counsel may glean some hope from is the Sullvan case, which is an 88 Michigan Appeal case 77, where they said that the--that filing the claim could be grounds for slander of title. The filing of a claim, not notice of lis pendens. Notice of lis pendens is going to be privileged filing of a claim. But even in a filing of a claim situation, it's incumbent upon the person claiming slander of title to show maliciousness and intent, and the court requires a true showing of maliciousness, not just the filing of--the filing of an improper

document is not maliciousness, and it's--

I think this court has sat through enough hearings on this case. We had a very substantial motion for summary disposition, as did defendants, and this court was not able to grant motions for summary dispositions on either side. I think in coming to that conclusion, the court has to recognize that Mr Fishell's claim against Mr Soltow is a legitimate claim, and if Mr Fishell's claim against Mr Soltow is a legitimate claim, whether he's successful or not, (p 19) that vitiates any possible claim that his lis pendens was filed maliciously, or with the intention of due harm to Mr Soltow, rather than the purpose of lis pendens, to put everybody on notice that he is claiming and interest in this property.

So I think that if the court--and we have a memorandum that we'll submit to the court today on just that issue, not

the issue of the counterclaim, because the counterclaim we've always looked at as hot air. There's no question under Michigan law that you're allowed to file a lis pendens, and Mr Fishell properly filed a lis pendens, and the counterclaim is an intimidation or scare tactic. We never filed a motion. At least I didn't. There was a motion filed for summary judgment counterclaim in Circuit Court before I was in it. We didn't pursue it. In all honesty, we didn't care if they tried to bring that up in a trial. Particularly, if this court remembers, we've claimed all along, until you and Judge Gibson wrote to the contrary, that we were entitled to a jury trial, and we would have--

The Court: We didn't hold that, the State Supreme Court did--not the Supreme Court. The Sixth Circuit Court of Appeals did.

Mr Turner: Not in my case. In my case you (p. 20) and Judge Gibson did, but once

it was ruled that we were not entitled to a jury trial, up to that point, we were anxious to see counsel and Mr Soltow try to manufacture or try to persuade a jury that there was a slander of title issue in the matter.

We think that we have made their credibility on the main suit even less likely, and let's get to the main suit, because I think the court ought to look at that for just a moment, too.

Counsel talks about--counsel for the trustee talks about these evaluations that they have made concerning their recommendation to this court. And my recollection is the first one that he pointed out was that there are very voluminous factual and legal issues that will be hotly contested. That may be the case, but I think that there are some very significant issues, factual and legal, that this court has to recognize are definitely in Mr Fishell's favor, some

that are not testimony, some that are just documents that we have offered in support--that we had offered in support of our motion for summary disposition.

There is no dispute that the dollars owed to Mr Soltow originally started out as a mortgage, no question about that. So I think that gives rise to the (p. 21) legal theory that we have about equitable mortgage, once there was a deed that taken out of escrow and filed.

There is no doubt about the fact that Mr Soltow has exhibited an interest in owning this property and not just getting his money back. He's so testified in his deposition that he decided that once Mr Fishell signed the documents on August the 25th, 1988 that gave rise to the present litigation. There is no question that Mr Soltow, within six days after he loaned Mr Fishell the last $55,000 to complete making his property marketable

commenced the wheels to demand payment from Mr Fishell in all the millions that he had signed to Mr Soltow. There is no question that that very note, that Mr Soltow was usurious. That's why counsel--

The Court: Mr Soltow did what?

Mr Turner: Every promissory note that Mr Fishell signed of indebtedness to Mr Soltow had usurious interest rates, and we've given the court all the documentation on that. They haven't--there's no documents-- they haven't denied it was usurious, and I think that's why counsel hedges when he says that one of the-- one of the things involved in this is what value, or the amount of money that Mr Fishell would (p 22) eventually owe to Mr Soltow if Mr Soltow would be successful in this adversary proceeding, and he has a hard time putting a handle on it. I can understand because there's been about $450,000 in principal, and,

of course, it's our position that there is no interest, because it was all usurious, and if you take away the usurious interest--and I don't believe that there's any way that counsel is going to be able to collect any attorney's fees on a case that the court determines was equitable mortgage, or was brought about by fraud. So Mr Fishell looks at owing Mr Soltow $450,000, not a million dollars.

The record shows that when this litigation was commenced, the property was worth a million three, and Mr Soltow had some exhibit that we got in a deposition that shows he put the value at a million five, and so we're probably talking about property that's worth, at least, a million five, and there's indebtedness of about $450,000. I can understand why Mr Soltow would like to

buy it for only another $2,000.

And don't let counsel for Mr Soltow kid you. Mr Soltow desperately wants this property. I think the depositions we've taken shows that he wants this property. I think his conduct before this court (P 23) shows that he desparately wants this property. If this court recalls, there was the Andre property which is adjacent to this property, and Mr Soltow was attempting to buy both of them from Mr Fishell, and Mr Fishell wouldn't do it, so counsel and Mr Soltow came up with the documents that led to this litigation.

When Mr Fishell filed Chapter 11, this court removed its injunctive order on the Andre property, and it went through foreclosure. Now, who bought it at foreclosure? Mr Soltow.

When Mr Fishell sold his right of redemption to a third party, and they redeemed

the property timely, who came to this court to try to have this transaction set aside? Mr Soltow.

Mr Soltow knows, as Mr Fishell, the values of both these properties. Mr Soltow would like to get this property that's involved in this litigation for the $450,000 that he's paid, plus another $2,000. I think $2,000 to settle this case is ludicrous. I think that all that he's doing is this property at a bargain sale.

I think that there is no exposure to the estate and to the creditors, because the counterclaim is useless. I think if the court waited until it resolves that issue on the objection of the (p 24) counterclaim, that will be very abundant to the court.

I think that the court has--I'll get back to Mr Nelson's list. Litigation risk was the first one. What the court has seen

the motions for summary judgment, the court couldn't grant any. Obviously, I feel that the defense has no merit. We've been pursuing this litigation for almost three years now. Mr Fishell spent a lot of time and effort, as have I, and I don't think we would do it unless we thought that they were--

We expected to get at least partial summary judgments granted on our motion for summary judgment on usury or, at least, on fraud or innocent misrepresentation. And I think the court ought to recall, when its going through this mental analysis, that there's very strong evidence of misconduct and misrepresentation by the Fraser firm and their dealings with Mr Soltow and Mr Fishell in this matter. And, of course, the court knows that there is presently a malpractice case pending by Mr Fishell against the Fraser firm, and the trustee has not decided how it's

going to proceed with that particular asset of the estate.

But litigation risk, there is always risk in litigation. I guess, I don't think there's, what I (p 25) call, any substantial risk or real risk in the counterclaim by the Soltows. I don't think any large claims could possibly result against the estate, because of this counterclaim.

I don't know what inevitable delay is. If that--if Mr Bush is telling us that if we're successful in the trial in August, we're going to appeal it, I don't think that's any justification for giving away the claim.

Cost of litigation. This is, this is almost humerous, if it wasn't so serious. When the trustee was considering pursuing this lawsuit, I advised him that I thought that Mr Fishell had really taken the abuse from the Fraser firm and Mr Soltow, and that I had worked without receiving pay-

ment for my time up to that point, other than just keeping track of it, an I would continue to do so through the trial of this issue, if that was going to be a concern to the trustee, that he had to pay attorney fees to pursue this claim, because I felt very strongly about the claim.

Evidently, that trustee has decided that he's got a greater cost risk, because he's decided he'd rather get something than represent Mr Fishell. In the past, I think, that along that line, Mr Bush made (p 26) the comment that the trustee had copious meetings with Mr Soltow in coming to this settlement, in reaching this--a conclusion, and assumed the trustee had done the same with Fishell.

I want the court to understand that isn't true. We had one meeting with Mr--I'm sorry, with the trustee, not the attorney, with the trustee, who--one time, right after he became the trustee. We gave him copies

of the brief and appendix that we filed in our motion for summary disposition. We solicited additonal meetings, we were refused. We particularly solicited additional meetings when we knew that they were meeting with Soltow and his attorney. We were refused. I don't know what copious work has been done to evaluate this from Mr Fishell's side, other than reading our brief in support of our motion for summary disposition and our exhibits, which are attached to it.

I think it's really unfortunate that Mr Fishell sought the protection of the bankruptcy court, as counsel for the trustee pointed out, to see if we can wipe out the Soltow claim. There's sufficient money to give substantial payments to all the creditors.

I don't doubt that when Mr Fishell filed (p 27) for protection in this court, it was the cash flow situation that was the real problem, and the fact that the Andre

property was going to be sold at foreclosure, and the only business assets that Mr Fishell, that he was using in the business fashion, were the Soltow property litigation and the Andre property litigation. He had a home and a farm free and clear of this, probably worth a couple hundred thousand dollars, and he had a condo in Florida that was probably worth a couple hundred thousand.

Immediately upon being in Chapter 11, this court came to the conclusion that there was no equity in the Andre property and released that to proceed to foreclosure, so Mr Fishell was out of luck as far as that property was concerned in getting any plan organized to develop that property and make any money off that property. Then the trustee, the federal trustee, moved to have this, with the assistance of Mr Soltow and his attorneys, moved to have this matter converted to a

Chapter 7. To avoid that, Mr Fishell tried to get this court to let him keep it in Chapter 11, either borrow or sell the property in Florida, to do something with the Andre property. The court declined that request to borrow money, because the court had determined that there was no equity in the Andre (p 28) property.

The next thing that occurs to Mr Fishell is that he, because the court won't let him borrow against that money, he sells that right of redemption for $1.00. The next thing this trustee, the new trustee, then does for him is he files a complaint before this court denying him a discharge in bankruptcy, because he has sold this valuable, according to this court valueless, right of redemption for a dollar.

So everything that has come up since Mr Fishell has filed for protection of this bankruptcy court has buried him a little

deeper. If they do this, if they get rid of this asset that's worth a million-and-a-half for indebtedness of $450,000, that just buries him a little deeper, I suppose, and it's really frustrating to come to get protection under bankruptcy court and end up having the trustee in bankruptcy sell the property in Florida to pay off creditors and to settle the Soltow litigation, which is the biggest asset that Mr Fishell had, settle that for $2,000.

And I don't know what he's going to do with the malpractice claim against the Fraser firm, and I don't know what he's going to do considering the farm, but it's no wonder that they can repreent to this(p29) court if they dispose of this groundless counterclaim for $2,000, they can make substantial payments to other creditors. I would think so. Mr Fishell, when he filed this petition in bankruptcy, other than ridiculous claim by Mr Soltow that he pro-

bably owed less than $200,000 in indebtedness and had $400,000, so it does not surprise me they can do that.

It does surprise me that they would represent to this court that the counterclaim by Mr Soltow has any merit at all, and they have any fear of any large claim against the estate based upon the counterclaim.

And we would respectfully request that the court, to not approve this settlement, particularly at this time. Let it get on for hearing on the objection to Mr Soltow's claim. Let that be disposed of. Let us go to trial in August and conclude the Soltow matter, probably without any counterclaim, and maybe that gets some of the protection that Mr Fishell came to this court to receive in the first place.

And I would file with this court our memorandum in opposition to the trustee's motion to settle the Soltow adversary pro-

ceeding, and that memorandum just goes to the issue of the counterclaim, Your Honor. (p 30) The court is well aware of the claims and the factual situations and the legal issues involved in the initial adversary suit by Mr Fishell against the Soltows.

The Court: You understand, Mr Turner, that I have not had an opportunity to read this. I have read every one of the other briefs that have been filed timely, but I can't read a brief--how many pages is this, at the time of the trial with all the other cases we have, with all the other people that are in this courtroom that have matters to be heard. There's no way that I can read this brief and hold them up.

Mr Turner: That's why I tried to argue what's in the brief, Your Honor, but, in addition to that, you had an advantage that I haven't had, because I haven't seen any brief that was filed in this

thing, but I have seen a motion.

The Court: Well, I surprised when you were here. I understood that the Fishells were being represented by their son.

Mr Turner: Well, as this court is aware, I've been the attorney--

The court: He did file a brief, and I did read that brief.

Mr Turner: As the court is aware, I've(p 31) been the attorney of record for the Fishells in the adversary proceeding since day one in this-- in the bankruptcy court, and I would assume that if a brief was filed, either by Mr Nelson or by Mr Bush, that a copy of it would have been sent either to Mr Fishell, Richard Fishell or Dorothy Fishell, and/or to Roger Fishell, and I have seen no brief. I've seen a motion. I wondered if they didn't have to file a motion to--brief to support their motion, and I wondered if they would have to take testimony so that we could cross-examine

them as to how they arrived at the conclusion they presented to this court.

The court: Okay. Your time is up now. Mr Nelson, any rebuttal--or I might ask, do you desire to present any evidence?

Mr Nelson: No, we don't desire to present any evidence. I believe that the case law in Rule 9019 indicates that the court can take judicial notice of the matters that are in the court's file, which are voluminous enough, without taking any more of the court's time by presenting evidence which would merely attempt to summarize all that.

The Court: Okay. Mr Bush, did you want to take--put on any evidence?

Mr Bush: No, Your Honor. (p 32)

The Court: Okay. Go ahead, then, Mr Nelson.

Mr Nelson: I'm not going to get into any detailed debate or analysis as to the merits of this case. Mr Turner suggests that the counterclaim is clearly without

merit, and that his--the plaintiff's case in chief appears to be pretty much a sure thing. If that were the case, if we were--if our office were to agree with that, perhaps we wouldn't be here today bringing this motion.

Suffice it to say that I can't be nearly as dogmatic about the merits or lack of merits with respect to the claim--counterclaim as can Mr Turner. We have conducted legal, independent legal research in this. We have reviewed virtually all of the adversary proceeding pleadings, all of the briefs, deposition transcripts, hearing transcripts, court opinions that have been rendered out of the state court and perhaps out of this court, as well. And our conclusion is as we've set forth in our prior argument with respect to the litigation risks.

I would like to address the issue of--that I think was implied by Mr Turner that

our office was meeting extensively with the Soltows and their counsel and not with his. And, quite frankly, I have never met (p 33) with Soltows' counsel. We've had some telephone conversations requesting copies of deposition transcripts, entering into stipulations, essentially freezing the property until we've had a chance to evaluate the claim, and to negotiate the ultimate settlement. I've never met Mr Soltow. And I understand he's in the courtroom today. I wouldn't recognize him, because I've never met him.

I did take an opportunity to examine Mr Fishell, Richard Fishell, in this-- in this courtroom in an extensive Rule 2004 examination in an effort to try and evaluate the merits of the case from his perspective. So, if anything, I've spent more time with the--looking at the Fishell side of the story than the Soltow side of the story.

It appears to me in summary, however,

Your Honor, that Mr Turner's interest is solely from the debtors' point of view. He's--he indicated that he agreed there would probably be substantial--enough assets for substantial distribution to creditors even with this settlement taking place, but he essentially said that left nothing--or little or nothing for the Fishells. Well, he, too, has to consider all the creditors.

And for the reasons we've already stated, (p 34) and I would emphasize that one of the factors is the paramount interest of the creditors of the estate, and I think it's absolutely clear, and no one has suggested otherwise, that the interests of all the creditors are better served by this settlement, and so we're again asking that the court approve the motion.

The court: Mr Bush, anything further?

Mr Bush: Just very briefly in rebuttal, Your Honor. Your Honor, I think the court

has heard from the attorneys involved in the adversary proceeding perhaps exactly what it expected to hear, and that is that Mr Turner indicated he felt he had a good case. I told you I felt he had a poor case, and I told you I thought we had an excellent counterclaim. And the final analysis, I don't think it's important, particularly, what the attorneys, who were hotly involved in the litigation, think.

What is important is what the independent trustee, who is charged with the legal responsibility to look out for the best interests of all involved in the estate and the creditors, what he thinks. And I think in that regard, the comments made by the attorneys, but notwithstanding the facts, that I think the points I've made have tremendous validity. I think they ought to be looked at in that light. (p 35)

With respect to our counterclaim, we

should point out a couple of things, Your Honor, and that is I haven't had a chance to review this material either, but suffice it to say, our counterclaim for slander of title would be pursued both under Michigan Statute and under Michigan Common Law.

The court: Was the counterclaim filed?

Mr Bush: Yes, Your Honor.

The court: How long ago?

Mr Bush: It was filed at the time of responsive pleading in Eaton County Circuit Court.

The Court: It was filed before you came in-before the bankruptcy took over?

Mr Bush: That's right, Your Honor, and I think this court has recognized in the passage I read from the prior hearing that the Court recognizes that the claim is out there and would be pursued.

I just want to say that the--in terms of the specific nature of the claim, it will be both statutory and common law. Cameron,

which is kind of the gospel on real property in Michigan, indicates that, section 30.18, in discussing the requirement for a slander of title action, that this malice that Mr Turner referred to as a necessary component of the cause of action can be inferred from any wrongful act (p 36) done intentionally without just cause or excuse.

It's been our position throughout this case, Your Honor, that this entire claim has been done without just cause, simply to hold up Mr Soltow from disposing or utilizing this piece of property.

The specific statute which empowers a slander of title cause of action, I think, has been set forth earlier to the court in MCLA 600.2725. So we feel very strongly that is a large claim with significant exposure to the estate.

Finally, Your Honor, with respect to Mr Fishell seeking the protection of the court,

and so on, and being disappointed on how things have gone in bankruptcy court. This court is very familiar with the procedural history about this case. This case was converted to a Chapter 7, and I quote the court's language from the hearing of January 21, "partly the fact that I don't think I can trust Mr Fishell anymore to comply with the law to do the things he's supposed to do." So I think the comments that are made by Mr Turner ought to be looked at in light of what actually has gone on here since they came into bankruptcy court back in November 1990.

We would ask that the motion be approved and granted, and that the trustee be empowered to enter (p 37) into the settlement. The Court: As indicated by counsel, this case has had a long history. The litigation between the Soltows and the Fishells commenced before this case was filed. Voluntary petition and chapter 11 was

filed November 16, 1990. I don't recall now when the State court proceedings was commenced, but that was sometime before that.

This court cannot possibly recall at this time all of the things that have happened in this case that happened before the filing and happened after the filing. My recollection is that there was a dispute between the Soltows and the Fishells having to do with the property in question, that Mr Fishell had not paid on a mortgage which Mr--which the Soltows held.

The mortgage was being foreclosed, was almost at the date of the foreclosure proceedings, when there was some sort of an agreement reached between the parties whereby the-- and I could be wrong on some of these details, but as I recall, there was a proceeding whereby Mr Fishell-- the Fishells executed a warranty deed to the property in question, and Soltows executed

a discharge of the mortgage.

Both of these documents were placed in the hands of an escrow agent, Transamerica Title Company (p 38) comes to mind, but it could be some other company, but, at least, it was a title company. It provided that Mr Fishell would be given further time--or the Fishells would be given further time in which to pay the amount due and owing on the mortgage. If he didn't pay it by that certain time, the escrow agent would turn over the deed in question to the Soltows. If he did pay the mortgage off to the escrow agent, then the discharge of the mortgage would be turned over to the Fishells. The money was not paid, the deed was given to the Soltows, and, of course, the mortgage discharge was not given to the Fishells.

So the Soltows are the titleholders of the property in question due to an agreement, a presumed settlement, between the

parties. The purpose being, as I recall, that the the Soltows would not have to go through the proceedings of foreclosure; and therefore, would give more time to the Fishells to pay up the amount due and owing. I amy be wrong about some of those details, but something like that.

So you do have a situation where you had somewhat of a settlement way back long before this bankruptcy was filed. But courts usually are receptive to settlements, and it is very seldom for courts to set aside a settlement that the parties have entered into (p 39) by themselves. This--and there are many cases to that effect.

Now, one of the problems that, of course, the trustee in this proceeding has, he has a case where there was a settlement, there was a deed, a warranty deed, given to the Soltows, and the Soltows do hold the property, by the warranty deed.

This bankruptcy proceeding was filed, as I say,back in November 1990, and this proceeded under the debtors, as debtors in possession, under chapter 11, from that date until January 13, 1992. So for well over a year, this whole proceeding was under the control of the Fishells. This proceeding that, as I say, was commenced in the Circuit Court, was brought over into this court and became an adversary proceeding in this court.

This court has made every effort that it has been able to make to try to move this case along. We are--Courts are often criticized for delays in cases. This Court has run up against all kinds of frustrations in this proceedings. Every motion that almost is imaginable has been filed, and disposed of.

There was a claim for a jury trial. The court was of the opinion that this case did not require a jury trial, was held. And an

appeal was taken, and (p 40) that appeal took some time before the appeal was decided by the District Judge, Judge Gibson. As I recall, the Sixth circuit held that bankruptcy courts had no jurisdiction to hold a jury trial. So that disposed of that matter.

And we now have the case set, I believe, as indicated by the arguments of counsel, and I wouldn't argue with them, that this case is now set for trial in August, but I'm sure there will be more--if this is not settled, there will be more delays. There will be more applications for adjournments. For some reason or another, the Fishells just don't want this case to come to trial.

This case could have been tried long ago. It was pre-tried, a trial date was set, long, long ago, and--but we couldn't get to the trial. Because of the fact that there was being nothing done in con-

nection with the Chapter 11 case, as I recall, we didn't even have a plan filed, but I could be wrong on that, but, at least, there was no plan ever confirmed, and so we have had those delays.

It is true, I denied a summary judgment. It is true, there is a claim, I think possibly a valid claim, for usurious interest. Whether that was taken into effect in the settlement that was made some time (p 41) ago, that, I don't know, but I'm sure that the trustee has taken that into consideration in making the settlement that he has made and which is brought before the court today.

The court does approve usually settlements. We prefer settlements. The Court--usually, the parties in a proceedings are better able to settle on a reasonable basis than even the court can.

There has been no objection made by any creditor in this case to the proposed set-

tlement. The only objection that is made is from the debtors, themselves. Only the debtors want to go ahead and run up further expenses for this case, which is the-- what the trustee is trying to avoid.

I recognize the fact that the decision of this court in approving of the settlement may lead to another appeal, and, probably, the Fishells will appeal that. I don't know if they have any position to do that, if a debtor can object to an appeal, but they are doing it here, and we haven't objected, and I suppose we can take an appeal on this matter and delay this matter for a much longer time.

But, at least, if an appeal is taken, in that case, we will have to put up a bond, I'm sure, to protect the Soltows from any further expenses they may (p 42) have, and to protect them from any further damages that may be put upon them, because of the fact that here they have this apparently

nice piece of property, but they haven't had any right to do anything with it for all these years that have gone by, and, of course, if an appeal is now taken, there will be even a longer time. So they will have to put up a bond to take care of that so that there will be monies available by some bonding company to take care of that situation.

So because of the facts that I have indicated, the motion, the proposed settlement, is approved by the court, and an order may be entered.

Mr Nelson, would you prepare the order, please?

Mr Nelson: I'll prepare an order, Your Honor, and present it before the end of the day.

The Court: Thank you.

Mr Bush: Thank you, Your Honor.

(Matter concluded)

(P. 43, Certificate of shorthand reporter Lisa C. Dunmore omitted.)

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Chapter 7
Hon David E. Nims Jr
Case No NG90-85144

_____/

TRUSTEE'S MOTION TO APPROVE SETTLEMENT

NOW COMES John A. Porter the chapter 7 Trustee ("Trustee") by his attorneys, Clary, Nantz, Wood, Hoffius, Rankin & Cooper, and pursuant to Federal Rule of Bankruptcy Procedure 9019 requests that this court enter an order approving the settlement described in this Motion. In support of this motion the Trustee states:

1. The Debtor's filed a Voluntary Petition under Chapter 11 of the Bankruptcy code on November 16, 1990.

2. On January 13, 1992 this case was

converted to a case under Chapter 7 of the Bankruptcy Code and the Trustee was appointed to serve as the Chapter 7 Trustee.

3. At the time of the conversion of this case an adversary proceeding was pending entitled Richard L. Fishell and Dorothy M. Fishell, plaintiff/counterdefendants v Robert Soltow and Rosalee Soltow, defendant/ counter-plaintiffs, Adversary Proceeding No. 91-8015 (the "Adversary Proceeding"). The Adversary Proceeding was commenced by the Debtors' pre-petition in state court and was ultimately removed to this court following the filing of the Debtor's voluntary Chapter 11 petition.

4. The Adversary Proceeding involves the Debtors' claim of title to certain vacant, but relatively valuable, real property located in Oneida Township, Eaton County Michigan (the "Property"). The Defendants, Robert and Rosalee Soltow (the "Soltows"),

filed the counter claim seeking substantial money damages against the Debtors on a slander of the title theory.

5. The Trustee and his counsel have expended substantial resources in investigating and evaluating the merits of both the claims and the counter-claims raised in the adversary proceeding. Following such investigation and evaluation, the Trustee has determined that it is in the best interest of the estate and all of the creditors that the adversary proceeding be settled as set forth below. The Trustee bases his decision to enter into the proposed settlement upon factors which include, but are not limited to, the following:

A. Avoiding the risk of litigation which includes the risk that a large damage claim could potentially be asserted against the estate depending upon the outcome of the adversary proceeding.

B. Avoiding the delay inherent in the litigation process at both the trial and appellate levels.

C. Avoiding the cost to the estate of litigating the adversary proceeding which would involve numerous and complicated legal and factual issues.

D. Eliminating any claim against the estate by the Soltows who represented the Debtors largest pre-petition creditors.

6. The material terms and conditions of settlement are summarized below. A complete copy of the proposed Release and Settlement Agreement is available for inspection at the office of the Bankruptcy Court Clerk from 8:00 a.m. to 4:30 p.m., Monday through Friday.

A. All claims and counterclaims in the adversary proceeding shall be dismissed with prejudice and without costs and all Lis Pendens filed with respect to the property shall

be terminated and discharged.

B. The Trustee and the Soltow's shall mutually release the other (and, in the case of the Soltows, release the Debtors) from all claims generally, including any pre-petition debt claims which the Soltows could assert against the bankruptcy estate. The only exception to the mutual release is with respect to the Soltows claim of ownership of certain property known as the Andre property which is located adjacent to the Property.

C. The Soltows shall pay the bankruptcy estate the sum of $2,000.

D. The Settlement is subject to bankruptcy court approval and the entry of an order approving the settlement on or before July 10, 1992.

WHEREFORE, the Trustee requests that this court enter an order approving the proposed settlement between the Trustee

and the Soltow's and enter such other and further orders as may be necessary to consummate the settlement.

CLARY, NANTZ, WOOD, HOFFIUS
RANKIN & COOPER
Attorneys for the Trustee

Dated June 12, 1992

By__/s/_____
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